THE

TRIAL

OF

MUNGO CAMPBELL,

For the MURDER of

ALEXANDER Earl of EGLINTOUN.

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Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh decimo octavo die menſis Decembris milleſimo ſeptingenteſimo ſexageſimo nono, per Honorabiles viros Thomam Miller de Barſkimming dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, & Robertum Bruce de Kennet dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime affirmata.

INTRAN. MUNGO CAMPBELL, exciſe-officer at Saltcoats in the county of Air, and preſent priſoner in the Tolbooth of Edinburgh, Pannel,

Indicted and accuſed at the inſtance of Archibald earl of Eglintoun, brother-german to the deceaſed Alexander earl of Eglintoun, with concourſe, and alſo at the inſtance of James Montgomery, Eſq. his Majeſty's Advocate for his

Majeſty's intereſt, for the crime of murder, in manner mentioned in the criminal indictment raiſed againſt him thereanent, bearing,

THAT where, by the law of God, and the laws of this and every other well governed realm, MURDER, or the felonioufly bereaving any of his Majeſty's ſubjects of their lives, is a moſt atrocious crime, and ſeverely puniſhable; YET TRUE IT IS, and of verity, that you, the ſaid Mungo Campbell, have preſumed to commit, and are guilty, actor, or art and part of the ſaid crime; IN SO FAR AS the deceaſed Alexander earl of Eglintoun having, upon the twenty-fourth day of October, in this preſent year one thouſand ſeven hundred and ſixty-nine, or upon one or other of the days of that month, or of the month of September preceding, or November following, gone out from his houſe of Eglintoun, in the county of Air, in his coach, to look at ſome of his grounds, and being told by one of his ſervants, when upon the road from Saltcoats to Southennan, within the pariſh of Ardroſſan, and ſaid county of Air, that he obſerved two perſons, one of them with a gun, at a ſmall diſtance, upon his lordſhip's ground of Ardroſſan, the ſaid deceaſed earl (who, by an advertiſement in the news-papers, had forbid all unqualified perſons to kill game within his eſtate) came out of his coach, unarmed, and mounted a horſe which was led by his ſervant, and, leaving in his coach an unloaded gun, he rode towards the two perſons, who, in the mean time, went off the earl's grounds of Ardroſſan into the adjacent ſands, and he having come near to the two perſons on the ſaid ſands, and diſcovering the one with the gun to be you, the ſaid Mungo Campbell, he accoſted you, by ſaying, Mr. Campbell, I did not expect to have found you ſo ſoon upon my grounds, after the promiſe you made me when I laſt catched you, when you had ſhot a hare; and the earl having thereupon deſired you to deliver your gun to him, you refuſed ſo to do; and, upon the earl's approaching towards you, you cocked your gun, and preſented or pointed it at him: and upon the earl's then ſaying, Sir, will you ſhoot me? you anſwered, that you would, if his lordſhip did not keep off; to which the earl replied, that if he had his gun he could ſhoot pretty well too, or uſed words to that import; and deſired his ſervant to bring his gun from his coach, which was then at ſome diſtance; and the earl having diſmounted, and walked towards you, leading his horſe in his hand (without arms or offenſive weapons of any kind) you retired, or ſtept backwards, as he approached, and continued

tinued to point your gun at him, deſiring his lordſhip again to keep off, or, by God, you would ſhoot him: and a ſervant, near to the earl, having begged of you, for God's ſake, to deliver your gun, you again refuſed, ſaying, you had a right to carry a gun; to which lord Eglintoun anſwered, that you might have a right to carry a gun, but not upon his eſtate without his liberty; but you ſtill perſiſted in refuſing to deliver your gun; and by ſtriking your foot againſt a ſmall ſtone, having fallen upon your back when retiring and keeping your gun pointed at lord Eglintoun, as above deſcribed, the muzzle of the gun came thereby to be altered in the direction from lord Eglintoun, and to be pointed near ſtraight upwards; and lord Eglintoun, who was only diſtant from you two or three yards, having ſtopped or ſtood ſtill upon your falling, you, as ſoon as you could, recovered yourſelf, and, reſting upon your arm or elbow, aimed or pointed your gun to the ſaid Alexander earl of Eglintoun, and wickedly and felonioufly fired it at him, then ſtanding unarmed, ſmiling at your accidental fall, and by the ſhot he was wounded in the belly in a dreadful manner, the whole lead-ſhot in the gun having been thrown into his bowels, of which wound the ſaid Alexander earl of Eglintoun died that night about twelve o'clock. And you the ſaid Mungo Campbell, after perpetrating ſo cruel, wicked, and barbarous a crime, did immediately run to one of lord Eglintoun's ſervants who had brought his gun from his coach, and who was ſtanding at ſome diſtance, and endeavoured to wreſt the gun from him, but was prevented by the aſſiſtance of another ſervant; and when the two ſervants were engaged with you defending the gun, and endeavouring to ſecure you, the earl, who was then ſitting on the ground, called to the ſervants to "ſecure the "man, for he had ſhot him, but not to uſe him ill," or uſed words to that purpoſe and effect; and upon your being brought near to lord Eglintoun, he ſaid to yourſelf, "Camp-"bell, I would not have ſhot you." And you, the ſaid Mungo Campbell, when carrying from the place where you committed the foreſaid crime, to Saltcoats and Irvine, did acknowledge to ſundry perſons, that you had wilfully and intentionally ſhot the ſaid Alexander earl of Eglintoun: AND the ſaid Alexander earl of Eglintoun, when within two or three hours of his death, in giving an account to John Moor, ſurgeon in Glaſgow, who was called to give what aſſiſtance he could in the way of his profeſſion, of what had paſſed between you and him, did in ſubſiſtance ſay, that you, the ſaid Mungo Campbell, did take an aim at him, and ſhot him wilfully, and which account of the matter was given by the ſaid Alexander earl of Eglintoun with the greateſt

calmneſs and compoſure; and you, the ſaid Mungo Campbell, having been brought before Charles Hamilton of Craighlaw, Eſquire, a juſtice of peace of the county of Air, upon the ſaid twenty-fourth day of October one thouſand ſeven hundred and ſixty-nine; and thereafter before William Duff, Eſquire, Sheriff Depute of the county of Air, upon the twenty-ſeventh day of the ſaid month of October, you did voluntarily emit two declarations, which were ſubſcribed by you, and will be uſed in evidence againſt you upon your trial: and, for that purpoſe, both declarations ſhall be lodged in the hands of the clerk of the court of juſticiary, before which you are to be tried, that you may ſee the ſame: AT LEAST, at the time and place above deſcribed, the ſaid Alexander earl of Eglintoun was felonioufly murdered, or bereaved of his life, by a wound he received from the ſhot of a gun, and of which wound he died in about twelve hours, or ſome ſhort ſpace thereafter; and you, the ſaid Mungo Campbell, was actor, or art and part of the ſaid murder. ALL WHICH, or part thereof, being found proven by the verdict of an aſſize, before the lord juſtice general, juſtice clerk, and commiſſioners of juſticiary, you ought to be puniſhed with the pains of law, to the terror of others to commit the like in time coming.

JA. MONTGOMERY.

After reading the indictment, the court obſerved, That the indictment ſets forth, that the deceaſed earl received the ſhot of which he died upon the ſands adjacent to the grounds of Ardroſſan; and deſired the counſel for the proſecutors to explain if they meant the deceaſed earl received his wound upon the ſands of the ſea, and within the flood-mark.

The lord-advocate admits that the deceaſed earl received the ſhot of which he died upon the ſands of the ſea, and within the flood-mark.

(Signed) JA. MONTGOMERY.

The court thereupon deſired to hear counſel on both ſides upon this preliminary queſtion, Whether or not the court has juriſdiction to try this indictment in the firſt inſtance?

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Procurators for the Proſecutors.

James Montgomery, Eſq. his Majeſty's advocate,
Mr. Henry Dundas, his Majeſty's ſolicitor,
Mr. Alexander Lockhart, adv.
Mr. Robert M'Queen, adv,
Mr. Ilay Campbell, adv.
Mr. Alexander Wright, adv.
Mr. Andrew Croſbie, adv.
Mr. Alexander Gordon, adv.
Mr. Walter Campbell, adv.
Mr. Alexander Ferguſon, adv.

Procurators for the Pannel.

Mr. John Dalrymple, adv.
Mr. David Rae, adv.
Mr. John M'Laurin, adv.
Mr Robert Cullen, adv.

Parties procurators being heard at great length upon the ſaid preliminary queſtion, the lord-juſtice, clerk, and lords commiſſioners of juſticiary ſuperſede adviſing the debate till Friday next the twenty-ſecond inſtant, at three o'clock in the afternoon in this place; appoint parties procurators to make up minutes thereof, betwixt this and Thurſday next at twelve o'clock at noon, to be ingroſſed in the record; continue the diet againſt the ſaid Mungo Campbell, pannel, and whole other diets of court, till the ſaid twenty-ſecond inſtant, at the hour above-mentioned; ordain parties, witneſſes, aſſizers, and all concerned, then to attend, each under the pains of law; and the pannel in the mean time to be carried back to priſon.

Mr. David Rae for the pannel repreſented, That this court has here no juriſdiction, at leaſt in the firſt inſtance, but that the ſame does belong to the high court of admiralty. In the infancy of all ſtates and governments juriſdiction has been but imperfectly ſettled, and its conſtitution has only ripened by degrees; but from the earlieſt times, and indeed from the very nature of the thing, it has been territorial. The firſt judges were probably appointed for trying cauſes of all kinds, but were certainly circumſcribed to a territory, as their authority could reach no further than the bounds of that power from which ſuch authority was derived. Afterwards as nations came to be more civilized, and ſyſtems of laws and governments to be formed, it was found convenient to diſtribute juriſdiction among different hands, under the ſame head or government. Hence has ariſen the diſtinction between civil and criminal courts, and between many others that now obtain in different countries; but to all of theſe

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has ſtill been aſſigned a particular territory, within or over which ſuch ſpecies of juriſdiction may be exerciſed, and not beyond it. The feudal laws and uſages which have been received to a great degree in the country do more eſpecially limit juriſdiction to particular territories, as witneſs the juriſdiction of the barons, of lords of regality, of ſheriffs, &c. Diſtinct from theſe, though eſtabliſhed on the ſame principles, has been the juriſdiction of admiral, or courts of admiralty. While commerce and maritime affairs were little attended to, the eſtabliſhment of ſuch a juriſdiction might be overlooked; but when theſe matters began to be of more importance, it ſeems to have occurred to the government of every European ſtate bordering on the ſea, that a ſeparate juriſdiction ſhould be eſtabliſhed for the cognizance of ſuch affairs as either eſpecially related thereto, or as occurred either upon the ſea or ſhores thereof. Hence the high admiral was eſtabliſhed in France many centuries ago, with a very ample juriſdiction; and upon the ſame footing ſuch an officer, with equivalent powers, was very early eſtabliſhed in Scotland. What was the preciſe æra of that eſtabliſhment does not with certainty appear, but it is proved by our ſtatutes that it happened before the reign of James V. and that beſides the cognizance of civil cauſes of a maritime nature, the high admiral of Scotland was veſted with a criminal juriſdiction within a certain territory, that is to ſay, he was appointed the king's juſtice-general, not only upon the high ſeas, but alſo in ports and harbours, and in rivers below the firſt bridges, and on the ſea-ſhores as far as the higheſt tide flows, or below the flood-mark, whereby he had undoubted right to cognoce and try all crimes committed within theſe bounds, as much as the juſtice-court or high court of juſticiary had to try crimes committed in the internal part of the kingdom. That ſuch a juriſdiction and territory was and is veſted in the admiral cannot be denied, and appears not only from the act 1681, to be afterwards mentioned, but from many authorities long prior to that ſtatute, more particularly Welwood, in his Abridgment of the Sea-laws, does, in chap. 2d of his treatiſe, lay it down as then law, that the admiral of Scotland had the ſole criminal juriſdiction within the aforeſaid territory, and particularly mentions his right to try "ſhedders of other men's "blood on ſea or any port or river below the firſt bridge, "&c." Sir Thomas Craig, lib. iii. tit. 7. § 10. has theſe words, "poſtquam vero in mari dominari cœperunt, admi-"ralii officium introductum eſt cujus de rebus ſivi delictis "in mari aut in littere, aut etiam portu geſtis aut commiſis

" miſis juridictio erat." Sir George Mackenzie likewiſe, in his Treatiſe on the Criminal Law, publiſhed before the act 1681, in his title of the admiral's jnriſdiction, does expreſsly ſay, " That the lord high admiral and his deputies are, by " the laws of all nations, judges competent to all crimes " committed on ſea; and by an unprinted ſtatute with us, " the admiral is competent in all controverſies, actions, " and quarrels concerning crimes, faults, and treſpaſſes " upon ſea, *or ſo far as the ſame flows and ebbs:*" and he quotes not only the authority of Welwood, but of Preſident Balfour in his Practicks, title *Admiral*, and of another Scotſman named King, who wrote upon this ſubject. Theſe authorities ſhow, that at leaſt two centuries ago, the admiral's juriſdiction in crimes was with us extended to the flood-mark; and what clears and compleats the evidence on this head is the 16th act, 1681, paſſed in the third parliament of king Charles II. which ſtatutes and declares, " That " the ſaid high-admiral, as he is his majeſty's lieutenant and " juſtice-general upon the ſeas, and in all ports, harbours, " and creeks of the ſame, and upon freſh waters or na- " vigable rivers below the firſt bridges, *or within the flood-* " *marks, ſo far as the ſame does or can at any time extend*; " So the ſaid high admiral hath the ſole priviledge and ju- " riſdiction in all maritime and ſea-faring cauſes, foreign " and domeſtick, whether civil or criminal, whatſoever, " within this realm, and over all perſons as they are " concerned in the ſame; and prohibits and diſcharges all " other judges to meddle with the deciſion of any of the " ſaid cauſes in the firſt inſtance, except the great admiral " and his deputes allenarly." And this ample juriſdiction appears from the records of the admiralty court to have been exerciſed for ages paſt, without challenge, under the eye of this and the other ſupreme courts of the country. Crimes of every kind, and particularly murder and manſlaughter, committed within the admiral's territory, have been openly tried by him; and his ſentences, as well capital as others, duly put in execution. And as by the ſame ſtatute 1681, as well as by former ſtatutes, this court of admiralty is expreſsly declared " to be a ſovereign judi- " cature in itſelf, and of its own nature to import ſum- " mary execution;" ſo it was a doubt whether its decrees in criminal matters, were even ſubject to the review of this high court of juſticiary, till the caſe of *Long* and *Macadam*, in the year 1735, when this court received the ſentence of the admiral, in a criminal cauſe, as flowing from the ſame principles upon which the court of ſeſſion

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are by the ſaid act 1681, impowered to review his proceedings in civil cauſes. But down to this day no lawyer ever doubted that the court of admiralty ſtood veſted with a competent juriſdiction to try crimes committed within his territory, or within the flood-mark, in the firſt inſtance. And with regard to the nature of that juriſdiction, or whether the ſame is privative or excluſive of other judges, in the firſt inſtance, or if it is only cumulative with the juriſdiction of their courts, the point is no leſs clearly eſtabliſhed, that the admiral's juriſdiction is privative, both by principles and authorities.

Juriſdiction aſſigned within a territory does of its nature import that it is privative or excluſive in the firſt inſtance, as otherwiſe there could be no uſe or meaning in aſſigning a territory, and inextricable confuſion would follow. Hence the juriſdiction of lords of regality, &c. was always privative within their bounds ſo much, that they held, and for many ages exerciſed a power of re-pleading criminals even from this court; and where there are different courts competent to the ſame kind of cauſes, there is no example of the one's incroaching upon the territory of the other, *in the firſt inſtance*, without a ſpecial grant from the crown, or ſtatute, to that effect; none of which occur in the preſent caſe. The nature of the admiral's juriſdiction in this reſpect may alſo be illuſtrated from that of the admiralty of France, from which it has in all probability been copied by the kings of Scotland, when in great correſpondence with that country. Cleariack, in his treatiſe intitled *Us & Couſtumes de la Mer*, a book of great authority, and which was publiſhed in the laſt century, does, in treating of the juriſdiction of the marine in art. 39, p. 459, lay it down as a rule, that to the admiral and his officers belongs the cognizance, juriſdiction, and deciſion of all crimes, delicts, and malafices "Survenant ſur mer & pas "les greves d'icelle, *laquelle* connoigſance eſt interdité a "tous autres juges:" and in confirmation of this, he refers to the ordonances of the French kings in 1543, 1584, &c. Here it will be obſerved, that the cognizance of crimes falling within the admiral's juriſdiction is expreſly interdicted and forbid to all other judges: and the ſame author, in page 422, holds it as a rule that the place where a crime has been committed, ſubjects the delinquent to the juriſdiction of that place, which is exactly conformable to our opinion of criminal juriſdiction. In the like manner *Welwood*, in the paſſages already referred to, after mentioning the admiral's juriſdiction in cauſes civil and criminal, adds,

" That no other judge of any degree, at leaſt in Scot-
" land, may meddle therewith, but only by way of aſſiſt-
" ance; and that by commiſſion and in difficile cauſes, as
" was found in the action intented by Antoine de la Tour,
" and one Chriſtian Marteis, 6th Nov. anno 1542:" and for proof thereof, he refers to the records of Scotland, tom. i. c. 555. Further, the great ordonance of Lewis XIV. of France, concerning the marine, contains a particular chapter on the competency of the judges of the admiralty, and which begins with theſe words, " Les juges de l'admiraute
" connoitront *privativement* a tous autres, &c." And then goes on to enumerate the cauſes in which the admiral ſhould have a privative juriſdiction; and, *inter alia*, the article 10th is in theſe words, " Connoiſtront, pareillement des pira-
" teries & des pillages & deſertions des equipages, & generale-
" ment de tous crimes & delits commis ſur la mer; ſes ports
" Havres & Rivages." This ordonance bears date the 24th of Auguſt, 1681, and immediately thereafter followed our ſtatute above-mentioned, paſſed in September 1681, which, though ſhorter, does evidently proceed on the ſame plan, and declares, the admiral court to be a ſovereign court; the admiral to be the king's lieutenant and juſtice general upon the ſeas, &c. and to have the ſole privilege and juriſdiction in all maritime or ſea-faring cauſes, whether civil or criminal, and prohibits all other judges to meddle therewith in the firſt inſtance. Theſe words of the ſtatute, therefore, cannot leave a doubt, that in all crimes committed within the admiral's territory, his juriſdiction was intended to be privative and excluſive; and accordingly lord Stair, in his Inſtitute, book iv. tit. 37. § 4. does expreſly ſay, " That all actions criminal, committed at ſea, or within the
" ſea-mark, are *proper* to be judged by the high-admiral
" of Scotland:" and it is clear, that by the word *proper* he means, that the juriſdiction is privative or excluſive, as he is there deſcribing the proper or privative juriſdiction of courts of different kinds. It is true, that Sir George Mackenzie does ſay, that the juſtices, or juſticiary court, has a cumulative juriſdiction with the admiral in crimes committed at ſea; but it will be noticed, that he wrote before the act 1681: and a late learned judge of this court, in manuſcript notes upon Mackenzie, has obſerved, " that the mat-
" ter was now clear by the act 1681, and that in the caſe
" of and others
" 1723, the lords were of opinion, that the judge-admiral
" had a privative juriſdiction in prima inſtantia;" but the diet was deſerted ante ſententiam. The caſe here referred

to, appears from the records of the court, to have been that of Thomas Lamb, who was indicted on the 13th of December, 1723, for deforcing cuſtom-houſe officers, and violently entering a ſhip in a harbour; but who having objected that the crime could only be tried by the admiral, the king's advocate thereupon deſerted the diet; and the ſame manuſcript notes contain an opinion, "that as the ſeſſion may reduce the admiral's decreets *incivilibus*, ever "ſince the act *a paritate*, the juſtices may reduce in *criminalibus* and their (i. e. admiral's) *privative juriſdiction* is "only declared (in the firſt inſtance) therefore their proceedings may be reviewed;" which ſhows that this court's having a power to review the admiral's proceedings, does not at all impeach his having a privative juriſdiction for trying crimes in the firſt inſtance that have been committed within his territories. In ſhort, Sir George Mackenzie appears to have formed his opinion not upon principles or ſtatutes, but entirely upon the fact of ſome crimes committed within the admiral's territory, having been tried by this court, particularly piracies committed at ſea in the years 1610 and 1613: and beſides theſe inſtances which he mentions, it is ſaid that in the year 1672, one Beith , a miniſter, was tried for killing a man on board a boat, within a port of the Iſle of Arran. But none of theſe caſes can ſuffice to eſtabliſh a juriſdiction in this court, which it had not by law; eſpecially as it appears from the records, that no objection to the competency of the court was there proponed, and that they all happened before the act 1681. In ancient times, when this juriſdiction of admiralty was firſt eſtabliſhed, the perſons employed in it ſeem to have been ignorant of their duty, which occaſioned the 157th act, 12th parl. James VI. limiting the juriſdiction of admiral to the ſame bounds it was in the time of James V. Afterwards the judges of the admiralty became more experienced and reſpected; ſo that by another act, being the 15th of the 20th parl. of James VI. the admiralty was expreſsly declared to be a *ſovereign judicatory*, upon this narrative or conſideration, "that the inſufficiency, corruption, and defects which were in the deputes and members of theſe courts in former times, and "whereby theſe judicatures were not thought worthy of "that favour, is now helped and well amended." It is not therefore ſurpriſing, that while the admiralty was in this weak ſtate, the juſtice court ſhould have made encroachments on its juriſdiction; for the very ſame thing happened

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to the juſtice court itſelf, as in thoſe days, and even down to the time of Sir George Mackenzie, the lords of ſeſſion, as being the more potent and reſpectable judicatory, uſed to encroach on the juriſdiction of the juſtice court, by not only advocating criminal cauſes, from inferior courts, but even ſuſpending its ſentences, although no ſuch power is now pretended to be in the ſeſſion. It likewiſe appears, that the judges of the admiralty were different, and uſed to call in the juſtices to aſſiſt them as aſſeſſors in difficult cauſes, which led theſe juſtices to uſurp upon the admiral's juriſdiction, and even to take upon them to try ſome of his cauſes, even ſuch as piracy, in their own court; but theſe were only ſo many illegal encroachments, which cannot be regarded, and which have not been repealed ſince the act 1681, confirming the admiral court in its juſt privileges. For with regard to any caſes that have occurred in this court ſince that ſtatute, none of them do go the length of affording a precedent for this court's trying in the *firſt inſtance* a crime entirely committed within the admiral's territory.

In the caſe of Sir Alexander Anſtruther, in the year 1720, the crimes charged were the carrying a man by force from a houſe, after beating him there, then putting him on board a veſſel, and from thence landing him and carrying him as a priſoner through the country; whereby it appeared that the crimes charged were begun and terminated within the juriſdiction of this court, and which therefore behoved to be competent to try them. The like was the caſe of Paton, and others, tried in the ſame year 1720 for ſedition, riots, and hameſucken, by aſſaulting people within the territory of this court, then plundering a ſhip of meal, and carrying that meal into the country. In thoſe caſes no objection could be to the competency of this court, and none was made thereto. In the next caſe of Thomas Gray, in the year 1751, the objection was indeed ſtated for the pannel in regard that the forcible marriage was laid as committed by him upon the ſands of Muſſelburgh, but it was moſt juſtly repelled, in regard not only that it did not appear that the ſame happened within the flood-mark, but in reſpect that the forcible marriage was only a branch of the crimes charged againſt him, he being accuſed of a forcible abduction of a young woman from Canon-milns to the ſands, and of having carried her back from thence to Jock's-lodge, where he attempted, by violence, to conſummate his pretended marriage: ſo that the offences charged were both begun and ended within the territory of this court, which was ſufficient to eſtabliſh the juriſdiction in that caſe. And as to the caſe of James Johnſton,

ſion, and others, who were tried in this court in the year 1756, for a riot at Pittenweem, it appears that the court doubted of its own juriſdiction; and therefore heard the counſel for the proſecutor in ſupport of it, as the counſel for the pannels refuſed to make any objection, or ſo much as to argue upon the point. Under theſe circumſtances, where all the argument was on one ſide, the court found that the trial might proceed before them; but they did ſo upon the ſame principles as had governed the caſe of Gray already mentioned, ſeeing the indictment did there charge that the crime begun by the pannel, and others, aſſembling in a tumultuous manner, with offenſive weapons, horſes, carts, &c. upon the land; that they then went aboard a ſhip lying in the harbour at Pittenweem; and having confined the officers of the cuſtoms, took out all her cargo, and from thence carried the goods on a board to Leuchars; "and "diſpoſed of them as their property, and payed the ex-"pences of carrying the ſame." Here was continued wrong both begun and ended within the juriſdiction of this court; and where that happens, it is impoſſible to divide the cognizance of a crime, and lawyers hold that the *forum* may be eſtabliſhed, *ubi crimen inchoatum eſt*; and much more ſo muſt that court have juriſdiction within whoſe territory a crime is both begun and ended. None of theſe caſes therefore do in the leaſt affect the preſent, where the whole of the crime charged is admitted by the proſecutor to have happened within the admiral's territory, and conſequently the court can take no cognizance of it in the firſt inſtance, unleſs it has truly a cumulative juriſdiction with the admiral in every crime whatever; for by the ſame rule that the court can try a murder ſaid to have been committed within the flood-mark, it may try a like crime committed on the high ſeas at any diſtance from the ſhore, which was never attempted to be done in any caſe, at leaſt ſince the act 1681, and which would be totally ſubverſive of the admiral's juriſdiction. Nor is there any ground for a diſtinction between crimes properly maritime, or not maritime, though alike happening within his territory, as if the admiral were privative in the one and not in the other; or, in other words, that he is privative in ſuch crimes as piracy or others relative to ſhipping, and not in murder which can be committed at land. Every crime is a maritime crime in the ſenſe of the act 1681, if it be ſuch as can be committed either at ſea, or within flood-mark, which murder, as well as robbery, undoubtedly can be; and it would lead to the moſt abſurd conſequences, were

any other diſtinction to be received. A deforcement of revenue officers certainly can be committed at land as well as at ſea; and yet in the caſe of Lamb, in the year 1723, when charged to have been committed on board a ſhip, this court ſeem to have held it as not falling within their juriſdiction, but within that of the admiral; and ſo late as the year 1759, when William and Alexander Avens, and other fiſhers at Buckie, were tried for boarding a boat in a creek near the town of Findochlie; and there beating and deforcing the cuſtom-houſe officers, and carrying the boats and goods to ſea, the then lord advocate thought it neceſſary to bring the trial before the judge of the admiralty, which it may be preſumed he would not have done had he not been of opinion, notwithſtanding the caſe of Pittenweem and others above-mentioned, that ſuch a crime, when committed entirely within the admiral's territory, would only be tried in the firſt inſtance before that judge. Indeed, that no other diſtinction can take place, but that ariſing from the *locus delicti* is manifeſt from what has been already ſtated; and which is alſo enforced by the principles of the law of England, where for aſcertaining what crimes, as well as what contracts fall under the cognizance of the admiral or the courts of common law, no other criterion is fixed but that of the place where the crime or contract had its exiſtence; ſo that if the ſame was within the admiral's juriſdiction, the cognizance thereof is peculiar to him. This appears from the new abridgement of the law, commonly called Bacon's, but ſaid to be the work of lord chief baron Gilbert, vol. 1ſt. p. 623, *et ſeq.* And ſo well was the admiral's juriſdiction in crimes committed within his territory held to be eſtabliſhed, that it required an expreſs ſtatute, *viz.* that of the 28th of Henry VIII. cap. 13. for authoriſing the trial of ſuch offences by commiſſion according to the rules of the common law, inſtead of the civil law, which otherwiſe takes place in the court of admiralty. That ſtatute provides "that all "felonies and robberies, *&c.* upon the ſea, or in any ha- "ven, river, creek, or place where the admiral or admirals "have, or pretend to have, power, authority, or juriſdic- "tion, ſhall be enquired, tried, *&c.* upon commiſſions di- "rected to the admiral or admirals, or to his or their deputy "or deputies, and to other three or four ſubſtantial perſons "named by the lord chancellor;" which clearly ſhews that the juriſdiction of theſe crimes was ſtill kept diſtinct from that of the courts of common law. And as we have no ſuch ſtatute in Scotland, it fortifies the preſent argument, that felonies committed within the admiral's territory muſt be tried before

before the admiral, where the ſame form of trial by jury, and the ſame rules of law are obſerved, as in this court of juſticiary. It is true, that in England the courts of common law, have cognizance of offences committed upon the ſea-ſhore or ſands, when not covered with water, and even in ports and rivers, when *infra corpus comitatis*; but that cannot at all affect the preſent caſe, becauſe the territory of the admiral of England is limited to the high ſeas, and does not extend to the ſhores, unleſs when covered with water, nor to any waters within the body of a country; whereas the juriſdiction of the Scots admiral does by expreſs ſtatute extend to ports and harbours, and to the ſea-ſhore as far as the higheſt tide flows, whether the ſands or ſhore below the flood-mark be at the time covered with water or not; and where his juriſdiction or territory begins, there the juriſdiction of this court in the firſt inſtance muſt terminate.

ILAY CAMPBELL and ſollicitor DUNDAS for the proſecutors anſwered,

THAT the priſoner at the bar ſtands indicted before this high court of juſticiary for the crime of murder committed by him as follows: ---That on the 24th October laſt Alexander earl of Eglintoun having gone to take the air in his coach in the neighbourhood of his own houſe, in the county of Air, one of his ſervants came up to the coach, and informed him of two perſons being upon his grounds of Ardroſſan, one of them with a gun; upon which the earl, who had ſtrictly prohibited, by publick advertiſements, all perſons from ſhooting or killing game upon his eſtate, mounted on horſeback, rode after, and came up with them, after they had got upon the adjacent ſands; and finding the priſoner to be the perſon who carried the gun, the ſaid earl remonſtrated with him for ſo doing, and deſired him to deliver up the gun, which the priſoner refuſed, and ſoon after cocked the gun, preſented and pointed it at him, going onwards at the ſame time, till at laſt the gun was fired, and a mortal wound given to the earl, in the way and manner ſet forth in the indictment, of which wound the earl died that ſame night.

This is the ſubſtance of the charge: and it has further been explained in a ſeparate minute made upon a motion of the court in the beginning of the debate, that the ſands ſpecified in the libel, adjacent to the lands of Ardroſſan, are the ſands of the ſea; and that the gun was fired, and the wound given, within the high-water-mark: both parties being then upon the dry beach, or ſhore, between the high and the low-water-mark.

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An exception has from thence been taken to the juriſdiction of the court, founded upon a ſuppoſed excluſive privilege in the lord high admiral of Scotland, and his deputies, to try all crimes committed upon the ſeas, or in ports, harbours, and creeks of the ſame, or upon freſh waters and navigable rivers below the firſt bridges, or within the flood marks. But to this exception, founded chiefly upon an act of the Scots parliament, *anno* 1681, chap. 16. the following anſwers occur for the proſecutors.

At what time the office of high admiral firſt aroſe in Scotland, does not with certainty appear; but there is clear evidence that his juriſdiction is not antient. It is probable that his office was originally of a mere miniſterial nature, conferring a command at ſea in time of war, and attended with certain powers and privileges relative to ſea affairs, particularly with regard to prizes, and to wrecked goods, but without any judicial cognizance or juriſdiction. Afterwards he came to aſſume a power of judging in maritime affairs even in time of peace; but ſtill this juriſdiction went no farther than to caſes ſtrictly maritime, and was cumulative with the univerſal and radical juriſdiction which the ſupreme judges of the common law, both in civil and criminal matters, had over the whole kingdom.

Alexander King, a manuſcript author upon the admiralty of Scotland, who wrote in the laſt century, and who muſt be ſuppoſed to have underſtood the ſubject, as he himſelf enjoyed the office of judge of the court of admiralty, gives an account of the riſe and progreſs of this juriſdiction, ſimilar to what has already been ſuggeſted. He ſays the admiral was an officer appointed in time of war, to preſide over the king's fleets, and took a military oath; that in time of peace he exerciſed a juriſdiction conſequent upon his office, which the author explains in theſe words. *De omnibus itaque contraverſiis marinis cognoſcit amorans. Marinas contraverſias intelligo omnes eas quæ navigationis ratione ineuntur, ſive ex contractu vel quaſi contractu, ſive ex maleficio aut quaſi ex maleficio oriuntur, nec inter eſt in mari an in terra contractus celebrentur, delicta tamen ex neceſſitate intra maris fluxum perpetrari debent.*

What ſhews that this juriſdiction is not of an early date in Scotland, is, that no mention is made of it in the *Regiam Majeſtatem*, or in any of the other relicks of our antient ſtatute law, collected together in that book, though it is remarkable that all the other juriſdictions in Scotland are particularly treated of and deſcribed; for example, the juſtice court, the ſheriff court, regality courts, chamberlain courts, *&c.* Further it appears from Sir George Mackenzie, (Crim. part 2. tit.

tit. 9.) and from the act of parliament 1593, c. 154. and conſtitutions ratified thereby (*vide* Appendix to Statute Law abridged) that the deans of guild, of burghs, and water-baillies were in thoſe days the judges in civil maritime queſtions; and that the lord juſtice-general, and his deputes, were the judges in criminal cauſes of a maritime nature.

The juſtice general, and his deputes, were indeed the ſupreme criminal judges over the whole kingdom, without any exception, either as to cauſes, or as to territory. Their commiſſions were ample and unlimited. The grants of juſticiary to the family of Argyle, who long enjoyed that high office, were *infra totum regnum noſtrum*, and to determine *omnes et ſingulas cauſes criminales* One of them by James the Vth. to Archibald earl of Argyle, dated 28th October, 1529, is exhibited to the court. There are likewiſe many old ſtatutes appointing the juſtice and his deputes to hold courts in the different parts of the kingdom, iſlands included, that juſtice might be adminiſtered over the whole realm, (ſee Skene *voce Iter)* and no diſtinction appears between crimes committed upon the coaſts, harbours, or ſeas, and thoſe committed within the body of the kingdom: on the contrary, certain treſpaſſes which ſeem to be of a maritime nature, are mentioned in ſome of the old ſtatutes (ſtat. Rob. I. c. 11. parl. 1449. c. 9.) as puniſhable by the juſtices, ſuch as killing ſalmon within the ſea or flood-mark in forbidden times, and other matters relative to cruives and fiſhings.

The firſt notice taken of the admiral's juriſdiction in any of our ſtatutes, is in parliament 1592, cap. 160. of the ſmall edition; and from this act it appears, that in the preceding reign, *viz.* that of queen Mary, the earl of Bothwell, lord high admiral, had obtained ſome unuſual clauſes in his grant of admiralty, and uſurped a higher juriſdiction than was conſiſtent with the law, which having been greatly complained of, the ſaid act was made in order to remedy the abuſe, and to reſtore matters to where they were before the death of James the Vth. At the ſame time it is remarkable, that even in queen Mary's reign cauſes ſtrictly of a maritime nature were judged by the court of ſeſſion in the firſt inſtance. This appears from the caſe of lord Bothwell *contra* Fleemings, 9th March, 1543, which is to be found in Sinclair's Manuſcript Collection of Deciſions, in the advocate's library. The only peculiarity obſervable in this caſe, is, that the judge admiral is ſaid to have taken his ſeat in the court of ſeſſion, and voted along with the judges of that court, which he was probably allowed to do from *commitas*, or from the idea of cumulative juriſdiction, as we ſee from the act 29.

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parl. 1537, that this was practiſed in other caſes of cumulative juriſdiction.

The next mention of the admiral is in the act 15th parl. 1609, and the notice which is there taken of him does not convey a high idea of his juriſdiction. In 1606 an act had paſſed directing execution of horning to paſs on the decrees of ſheriffs, ſtewarts, and baillies; but in which act it would ſeem the admiral and his deputies had been purpoſely omitted, becauſe not worthy of that privilege. Some care, however, had been taken before the year 1609 to fill the offices of admiralty with more able and proper men; and an act was then paſſed, allowing the ſame execution to proceed upon their decrees, as in the caſe of other inferior judges; and indeed there was more reaſon for this regulation with reſpect to admiral decrees than in any other caſe, becauſe ſtrangers and ſeafaring people being generally the parties concerned, it was very proper that there ſhould be ſummary execution upon them. This act indeed mentions the admiral court as a ſovereign judicatory; but the meaning of this is explained by Sir George Mackenzie, in his obſervations, to be, that the high court of admiralty held at Edinburgh is ſuperior to all the deputy admiral courts held in other parts of the kingdom, and has a power of reviewing both the ſentences of theſe inferior admirals, and alſo his own decrees. It was ſtill a court ſubordinate to the ſeſſion and juſticiary, and remains ſo to this day; as it is a point not diſputed, that the decrees of the high court of admiralty, even in cauſes the moſt ſtrictly maritime, are liable to be brought before the ſupreme courts of ſeſſion and juſticiary in the ſecond inſtance, by way of ſuſpenſion or review; and at the time of the act laſt referred to, they could be brought alſo in the firſt inſtance, as already mentioned.

In the years 1610, and 1613, recently after the act 1609, two inſtances appear on record of trials for piracy, one of them before the privy council, and another before the court of juſticiary. Sir George Mackenzie takes notice (Crim. Part II. tit. 9.) of them, and lays it down as a clear propoſition, that the admiral's juriſdiction was then cumulative with that of the juſticiary, even with regard to crimes of a maritime nature committed at ſea.

And indeed the caſe could not be otherwiſe, for however ample the grants of juſticiary have been to the lords high-admiral, they could not be more ſo either as to territory or cauſes than thoſe voted in the two ſupreme courts of ſeſſion and juſticiary. Theſe courts had an univerſal juriſdiction over the whole kingdom without exception; and therefore

the neceſſary conſequence of the admiral's having likewiſe a juriſdiction either of one kind or another, was, that he exerciſed that juriſdiction *in cumulo* with the ſupreme courts. In order to make the admiral excluſive with reſpect to his juriſdiction, or any part of it, a ſtatute was neceſſary, declaring him to be ſo, and prohibiting the ſupreme courts from exerciſing that branch of juriſdiction.

The courts of ſeſſion and juſticiary have a clear, radical, and original right, to judge admiral cauſes as well as others, unlimited as to territory, and without diſtinction as to matter. If the admiral therefore, a magiſtrate of recent date, claims any privative juriſdiction, he muſt prove it; and accordingly he appeals to the act 16th of the parliament 1681, as the charter of his excluſive jnriſdiction.

The proſecutors do admit, that by this act, he has obtained an excluſive juriſdiction in the firſt inſtance with reſpect to certain matters; but they contend that this excluſion can go no further than the act carries it; and that both from the words and intention of the law, and from the reaſon of the thing, it is clear that his excluſive juriſdiction, both in civil and criminal matters, is limited *ratione cauſæ*. The act conſiſts of two parts, which are apt to be blended together, and not ſufficiently diſtinguiſhed, viz. a declaratory, and an enacting part. The firſt points out what the juriſdiction was then underſtood to be; it declares the court to be ſovereign, and to import ſummary execution, the meaning of which has already been explained. The ſecond part proceeds likewiſe upon a recital or narrative, that the high-admiral is his majeſty's lieutenant and juſtice-general upon the ſeas, and in ports, harbours, creeks, &c. and enacts that he ſhould have "the ſole privilege and juriſdiction in all *maritime and ſea-faring* cauſes foreign and domeſtic, civil or *criminal*, whatſoever *within the realm*, and over *all perſons* concerned in the ſame;" and prohibits all other judges from any cognizance of the *ſaid cauſes*, in the firſt inſtance. The after-part of the act allows ſuſpenſions of their ſentences in theſe cauſes, but no advocations.

The recitals contained in this act, declaratory of the powers already veſted in the office of high-admiral, muſt be explained by the law and practice antecedent to that period, and ought not to be mixt with the enacting words, which give a new additional privilege to the high-admiral of being excluſive in the firſt inſtance as to certain cauſes, viz. maritime and ſea-faring queſtions civil or criminal.

Formerly, although he was a lieutenant and juſtice-general, and a ſovereign court in certain reſpects, yet his juriſdiction

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was *cumulative* in *every reſpect* with that of the ſeſſion and juſticiary. By the act 1681, he is made privative in the firſt inſtance; but this privative juriſdiction is confined *ratione cauſæ*, both in civil and criminal matters. He is not made excluſive over a certain territory, but in certain cauſes, which fall under the particular province of an admiral, viz. maritime and ſea-faring cauſes wherever they ariſe, whether within the ſea or without it; and conſidering the enactment in this view, it was a proper and ſalutary one, as the admiral and his depute may be ſuppoſed to give more attention to maritime affairs, than other judges; but to extend this excluſive power to caſes not maritime, whether civil or criminal, would have been unſalutary and unexpedient.

The ſingle thing that gives a foundation for the argument on the part of the pannel, is that the recitals of the act beſtow high-ſounding denominations upon the admiral, ſuch as lieutenant and juſtice-general upon the ſea, &c. But in the firſt place this being narrative only, muſt be explained according to the former law, as already mentioned. 2dly. What ſeems to have given riſe to the particular ſtile in which this act is penned, is, that the duke of York was then commiſſioner to the parliament of Scotland, and at the ſame time lord high-admiral of the kingdom.

3dly. What ſhews that the admiral's juriſdiction, notwithſtanding thoſe recitals, was meant to be a juriſdiction with reſpect to cauſes, and not with reſpect to territory, is, that, in fact, the commiſſions to the admiral have all along been *univerſal as to territory*. The commiſſion to the preſent lord high-admiral, the earl of March, is exhibited to the court, which appoints his lordſhip "our vice-admiral, commiſſary "and deputy, in and through all that part of our ſaid king-"dom commonly called Scotland, and the maritime parts "of the ſame, and thereto adjacent."

4thly. The enacting words of the ſtatute are the rule by which this queſtion muſt be decided; and theſe words are unambiguous and clear, for they do expreſsly ſay that the admiral ſhall be excluſive in the firſt inſtance as to maritime and ſea-faring cauſes, civil or criminal, and over all perſons concerned in the ſame; and they do not ſay that he ſhall be limited to a certain territory, or that he ſhall have an excluſive power to judge of cauſes not maritime, either within or without that territory. The words maritime and ſea-faring cauſes, civil or criminal, were totally uſeleſs and improper, if an unlimited juriſdiction as to cauſes was meant. The act ought to have provided, that he ſhould be the ſole judge

competent to all cauſes, civil and criminal, ariſing upon the ſea, or in harbours, creeks, &c.

5thly, As to civil cauſes, it is a point not diſputed, that his juriſdiction is univerſal in point of territory, and limited *ratione cauſæ*. He is the ſole judge competent in the firſt inſtance, in all charter-parties, policies of inſurance, and other contracts of a maritime nature, whether entered into at ſea, or upon land; a contract of that ſort entered into in the city of Edinburgh, muſt be judged of by the admiral; and on the other hand civil cauſes, not maritime, ariſing upon the ſea, or in harbours and creeks, &c. are judged by the ordinary courts of law, and not before the admiral; for example, a minute of ſale of a land eſtate, a contract of marriage, or other matter of that kind, entered into on board a ſhip, or in a creek, or harbour, comes under the cognizance of the ordinary courts, and can with no propriety be brought before a court of admiralty.

It is true, the admiral has, by uſage, acquired a juriſdiction cumulative with the judge-ordinary in certain civil cauſes, not properly maritime, viz. in *mercantile* cauſes, and this has ariſen entirely from the connection of theſe cauſes with ſea-affairs; but this preſcriptive right of exerciſing a cumulative juriſdiction in mercantile cauſes, merely on account of their connection with thoſe which properly fall under the admiral's cognizance, does ſtrongly illuſtrate the argument which the proſecutors are maintaining, for it tends to ſhew, that if the admiral has likewiſe obtained a juriſdiction in criminal cauſes not maritime, this muſt be founded on the ſame preſcriptive origin, and not on the act of parliament, and muſt be cumulative with the ſupreme juriſdiction of the court of juſticiary.

Whether the admiral may, or may not, have acquired a cumulative juriſdiction in criminal caſes not maritime, ariſing upon the ſea, or in ports, harbours, and creeks, it is immaterial to inveſtigate; but ſuppoſing him to have ſuch a preſcriptive right, ſurely it cannot be of a different nature from his civil juriſdiction of the ſame kind, viz. cumulative with the judges ordinary. The court of juſticiary being univerſal over the kingdom, cannot be deprived of any branch of its juriſdiction, merely by another court's exerciſing ſimilar powers, without any ſtatute ſaying, that the rights of this other court ſhall be privative. And here it may be obſerved, that the act eſtabliſhing the Union, Article XIX. does plainly ſuppoſe, that the admiral's proper juriſdiction is confined to cauſes maritime; ſo that any other juriſdiction aſſumed by

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the admiral, is contrary to the ideas of the ſtatute law, and has been altogether an uſurpation.

The admiral, in civil caſes, being clearly univerſal as to territory, and limited *ratione cauſæ*, cannot be otherwiſe with reſpect to criminal matters; for it would be moſt anomalous to ſuppoſe, that his criminal juriſdiction is juſt the reverſe of his civil one; and ſuch a ſuppoſition would be directly contrary to the act 1681, in which the words maritime and ſeafaring, are applied to criminal as well as to civil cauſes.

It is true, there is this difference in the nature of the thing between civil and criminal queſtions, that few, if any inſtances can be ſuppoſed, of a maritime crime committed upon land; for which reaſon Alexander King, the author above mentioned, ſays, that maritime delicts, from neceſſity, muſt be committed within the flow of the ſea; but ſtill, if any caſe can be figured of a maritime crime committed upon land, i. e. a crime relative to navigation, or to ſea-affairs, the cognizance of ſuch crime falls undoubtedly in the firſt inſtance under the admiral's privative juriſdiction: and on the other hand, forgery, perjury, adultery, murder, &c. committed on board a ſhip, fall clearly to be tried before the court of juſticiary, and are improper for the admiral's cognizance.

The doctrine here laid down is ſupported, by the beſt authorities on the law of Scotland, as well as by precedents and the practice of their courts. In the hiſtorical law-tracts, the work of a very learned and accurate judge, (title Courts, p. 332,) this point is fully diſcuſſed and determined; and the author takes notice of a caſe of murder committed at ſea on board a boat, which having been tried before the court of juſticiary, the judges at firſt demurred, whether it fell under their juriſdiction; but, after mature deliberation, the juriſdiction was ſuſtained.

The author of the Law-inſtitutes, Vol. II. p. 540, agrees in opinion, that the excluſive juriſdiction of the admiral in criminal caſes, is limited to thoſe ſtrictly maritime. See alſo Mr. Forbes, in his Inſtitutes, Vol. II. p. 238, who enumerates the crimes which he thinks may be tried before the admiral.

Sir George Mackenzie, in his obſervations upon the act 1681, ſays expreſly, that the privilege thereby given to the admiral, is limited to maritime and ſea-affairs. Mr. Bayne, in his notes upon the Criminal Law, is of the ſame opinion.

Lord Stair mentions the ſubject in a very overly manner, without entering into particulars, and without making the proper diſtinctions; and the ſame thing is to be ſaid of Sir Thomas Craig. As to Balfour, p. 629, of his Practicks,

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his authority is taken from the laws of Olleron, and not from the municipal law of Scotland, see p. 614, of the same book; and his doctrine, if taken literally, goes plainly too far, for it includes the *affairs of merchandize and fishing*, which, by the law of Scotland, never were understood to fall under the admiral's privative jurisdiction.

Another author appealed to, viz. Wellwood, takes his ideas likewise from the sea-laws of other countries. At the same time, in p. 10. he explains the admiral's criminal jurisdiction in this way, "that they should have a sovereign jurisdiction "only proper to themselves, over all *sea-faring men* within "their bounds, and in all *sea-faring causes* and debates, civil "and criminal."

As to precedents, besides those already mentioned, a case appears, 13 June, 1672, of a minister in the Isle of Arran, being tried and condemned by the court of justiciary for murder committed on board an Irish ship, lying in the harbour of that island. The crime was commenced, carried on, and perpetrated on ship-board, and no doubt appears to have been entertained of the jurisdiction.

Upon the 9th of August, 1720, Fairney and others were tried before the court of justiciary for the crime of mobbing and sedition, by going tumultuously, armed with axes, &c. and invading an English ship lying in the harbour of Leven, wounding sailors, cutting the rigging, unhinging her rudder, carrying away sails and anchors, cutting holes in her bottom, damnifying cargo, &c. A similar case was tried 2d of February, 1756, where James Johnston, and others, were charged with having violently boarded a ship in Pittenweem-harbour, in which there were uncustomed goods, seizing the tide-waiters, confining them to the cabin, unloading the vessel, and then turning her adrift. The court demurred to the jurisdiction; and though the counsel for the pannels waved the objection, they ordered the other party to be heard; and, upon deliberately considering the matter, found the court competent. The crime here was likewise commenced and carried on aboard the ship; and it could make no difference in the argument, that the goods were taken from on board, and carried to a house on land, for the crime consisted in the hostile invasion of the ship, and the other acts committed there.

Upon the 6th of July 1722, Helen Wilson was tried before the court of justiciary for child-murder; and the fact charged against her was, that she had carried her child to the west side of an island, called Lammas-Island, nigh the harbour of Dunbar, and thrown him from a rock, whereby he was killed. This rock hangs over the sea; and there is no

doubt that the crime was committed within the ſuppoſed juriſdiction of the admiralty. It is believed a ſimilar caſe was lately tried before the circuit-court at Aberdeen, and no inſtances will be found of trials of that kind before the admiral.

The caſe of M'Adam and Long, in 1735, is likewiſe remarkable. They were tried before the admiral for killing Hugh Fraſer on board a boat on the ſea. The admiral pronounced an interlocutor on the relevancy, by which the defence being too much narrowed, the pannels were found guilty by the jury, and condemned by the judge. Upon application to the court of juſticiary, the ſentence was ſuſpended; and thereafter the priſoners having petitioned the court for liberation, the lords of juſticiary "granted warrant to ſet the petitioners at liberty, upon finding ſufficient caution acted in the books of Adjournal, each of them under the pain of 300 merks, that they ſhould anſwer to any criminal libel, or indictment, that ſhould be exhibite againſt them before the court of juſticiary within the ſpace of ſix months after the date of the bail-bond, at the inſtance of his majeſty's advocate, for the crimes mentioned in the petition." The court here underſtood themſelves to be cumulative with the judge-admiral, with reſpect to murder committed at ſea, as they obliged the pannels to find bail to ſtand a new trial before themſelves.

As to the caſe of Lamb and others, mentioned on the other ſide, none of them go further than to prove the admiral's exerciſe of a *cumulative* juriſdiction with reſpect to crimes committed at ſea, or in ports, &c. and this he has acquired by preſcription in the ſame way as he has done the cognizance of civil cauſes mercantile. Neither does Lord Royſton, in his manuſcript notes, give any thing more to the admiral than a privative juriſdiction in maritime cauſes, in terms of the act 1681. It is ſaid, that a declinature of the court was moved in the caſe of Lamb; but the record does not ſhow what that declinature was, or the proceedings on it. Neither does it appear whether the crime tried was maritime or otherways.

It was ſaid, that if the court of juſticiary could try murder committed within the admiral's juriſdiction, this would go the length of murders committed, not only within the narrow ſeas or ports belonging to Scotland, but in the moſt diſtant parts of the ocean; which the pannel's counſel were pleaſed to figure as ſomething extremely incongruous. But, with ſubmiſſion, where does the incongruity lie? when upon all hands it is admitted, that the courts of ſeſſion and juſti-

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ciary can do every thing in the ſecond inſtance, that the admiral can do in the firſt? Theſe ſupreme courts being competent to review the admiral's ſentences, have clearly a juriſdiction over his territory; and they do not diſpute with him that certain matters muſt, in the firſt inſtance, be tried before him. There is no defect of juriſdiction, but merely a ſtatutary injunction, that maritime cauſes ſhall firſt be tried by the admiral, ſubject to the review of the ſupreme courts. If the admiral can try a crime committed on the moſt diſtant parts of the ocean, there can be no doubt that the court of juſticiary can do the ſame, though, in order to enable both the one and the other to do it with effect, the perſon guilty muſt return to Scotland, ſo as to come within their power, and be perſonally brought to trial.

It was next ſaid, that foreigners coming accidentally here on ſhipboard, ought not to be tried by the municipal laws of the country, but by ſome general law of nations. But in the firſt place, this obſervation, when applied to the practice in Scotland, fails in one material particular, viz. that the admiral, in criminal caſes, tries according to the municipal laws of Scotland. 2dly, The obſervation could at any rate go no further, than to make it expedient that he ſhould have the cognizance over ſea-faring *perſons*, as well as ſeafaring matters: but no reaſon from thence occurs, why, in caſes which neither concern ſeafaring matters, nor ſeafaring perſons, he ſhould have an excluſive juriſdiction. At the ſame time, it has already been fully explained, that his juriſdiction is diſtinguiſhed *ratione cauſæ*, in the ſame way as eccleſiaſtical, military, or conſiſtorial juriſdiction, and that his pretended excluſive juriſdiction over a territory is without foundation.

It was argued, that originally under the feudal governments, all juriſdictions were territorial and privative, and particularly the juriſdictions of barons and lords of regality in Scotland, who had a power of repledging even from the juſtice-courts. But whatever may have been the caſe with reſpect to thoſe ancient juriſdictions, it is plain that the admiral's was of a different nature. The power of repledging, competent to barons, royal burroughs, and lords of regality, was much weakened, if not totally annihilated, before the admiral's juriſdiction had an exiſtence. And even in the earlieſt times, a baron who repledged was obliged to find ſurety in the court where the criminal was attached, to do juſtice within year and day. Quon. Attach. Cap. 8. As ſoon as the court of ſeſſion was eſtabliſhed, all courts in the kingdom were rendered ſubordinate to that court in civil matters, and the power of repledging in criminal caſes was alſo by degrees

grees taken away. These cases, however, of barony and regality jurisdiction have nothing to do with the present question.

Another argument used was, that warrants and executions issuing from the session and justiciary required the concurrence of the admiral, in cases where they were to be used upon the sea, or in other parts of his supposed territory.

But when this matter is enquired into, it turns out to be of no consequence to the argument. When letters of horning and poinding are issued in civil cases, if a ship or other maritime subject is to be affected, it is usual to apply for the admiral's concurrence, who writes on the back of the letters in these words, "The judge of the high court of admiralty "hereby grants his concurrence for putting the within letters "to due and legal execution as to all maritime subjects." This proves nothing but that the admiral is the proper judge in maritime affairs, and who has the power over maritime subjects. In order to arrest a ship his concurrence may be thought necessary; but it is an admitted point, that in civil questions, though arising on board a ship, if they are not of a maritime nature, his jurisdiction is not privative.

As to criminal warrants, the practice is not uniform. Instances happen every day of warrants to apprehend criminals granted by the judges of justiciary, being executed on board ships by the macer of justiciary without any other authority. An instance occurred within these few months of two criminals being apprehended on board a ship lying at and carried to prison by the macer, upon a warrant of that kind; and it can be proved by the macers and other officers of the law, that this is a case which frequently happens.

At the same time, it is believed that other instances can be given of applications made for the assistance of the admiral's officers to execute warrants on board a ship; and the reason of the practice seems to be this, that the messenger who executes a justiciary warrant being constituted *a sheriff in that part*, for the purpose of executing said warrant, it may be doubted how far his power of sheriffship conferred upon him could reach to parts which are beyond the ordinary bounds of a sheriff's jurisdiction. The defect therefore, if there is any, lies not in the want of jurisdiction in the court, but in the want of power in the executional officer.

At the same time it is more probable that the only meaning of the practice is, that as all officers of the law are required to give their assistance in executing such warrants, the macer of justiciary, when he has occasion to go on board a ship, naturally calls for the assistance of the officer of admi-

ralty, under whoſe immediate inſpection all ſhips are; and for the moſt part the admiral hears nothing of the matter, all that is done being to take the officer's concurrence, who, accordingly, upon being deſired, gives his aſſiſtance in executing the warrant.

It is plain, from what has already been ſaid, that the court of juſticiary has, at leaſt, as ample a juriſdiction in point of territory as the admiral court can poſſibly have. Both their commiſſions are equally extenſive. The warrants of juſticiary go into the ſuppoſed territory of the admiral, and are every day executed there, ſometimes with concurrence of the admiral's officer, and as often without it. Every act of that kind would be null and void if the court of juſticiary had no juriſdiction over that territory. Nay, the court, and the officers of juſticiary would be every day liable in the penalties of wrongous impriſonment, were there any foundation for the pretended excluſive juriſdiction of the admiral; and it is plainly of no conſequence, that the admiral's aſſiſtance, or rather that of his officer, is ſometimes required for the reaſons already mentioned.

It was, in the laſt place, ſaid, that the law of France, and the law of England made in favour of the pannel's doctrine, and particularly an ordonance of Lewis XIV. made in the ſame year with the act 1681.

It is immaterial to enquire what the laws of other countries may be in a matter which depends on the municipal laws of Scotland, and the conſtitution of Scots courts. The proſecutors are unacquainted with the law of France, where the admiral's juriſdiction may poſſibly be territorial in the ſame way as in England; but from the authorities appealed to on the Engliſh law, they apprehend that no argument whatever can be drawn from them to the preſent caſe. It would ſeem that in England all crimes muſt be tried as in a certain county, and that crimes committed upon the high ſea not being within the body of a county, are tried by ſpecial commiſſions of admiralty. The juriſdiction there is diſtinguiſhed not *ratione cauſæ*, but *ratione territorii*. All maritime contracts entered into upon land are determined by the courts of common law; and all matters of whatever kind which take their riſe upon the ſea, are tried by admiralty courts.

At the ſame time it appears from judge Hales, Vol. II. p. 16, &c. and other authorities, that the diſtinction of territory is between land and water; and that a crime committed, or contract entered into upon the dry beach or ſhore, though within the flood mark, falls under the cognizance of the common law courts. The ſpace between the high and low water

water mark is interchangeable, being a part of the ſea when covered with water, and parcel of a county when not covered; and the caſe of one Lacie is mentioned, where it was found that if a man be ſtricken upon the high ſea, and die upon the ſhore after the reflux of the water, the admiral, by virtue of his commiſſion, hath no cognizance of that felony. Had the preſent caſe therefore happened in England, there would have been no doubt of juriſdiction.

And this leads the proſecutors to conclude with an obſervation upon the act 1681, which was omitted in the courſe of the argument, viz. that although the flood-marks or firſt bridges are mentioned in deſcribing the admiral's juſtice-generalſhip upon navigable rivers; yet theſe expreſſions ſeem to be applicable ſingly to *navigable rivers*, and not to the ſhore of the ſea in other places. It may be neceſſary, in the caſe of rivers, to point out ſome boundary of that kind between the river and the ſea, to ſupply the want of a viſible boundary; but with reſpect to the ſea-ſhore, no ſuch boundary is neceſſary, becauſe nature itſelf points out the diſtinction between dry land and water, viz. where the dry land ends, and the ſea begins; or in other words, the margin of the water at all times, whether at high or low ſea.

If this obſervation be juſt, the pannel in the preſent caſe could have been been brought to trial no where elſe but before your lordſhips, as the fact was not even committed within the ſuppoſed territory of the admiral. And upon the whole, as the preſent caſe has nothing to do with maritime affairs, as neither a ſea-faring matter, nor ſea-faring perſons are concerned; as the unfortunate lord was murdered upon the dry land, within a few yards of his own property; and as the court of juſticiary is the ſupreme criminal court of this country, no reaſon occurs why ſo important a trial ſhould be ſent to the admiral court.

JOHN DALRYMPLE replied,

THAT he had two propoſitions to maintain; firſt, that the admiral has a general criminal juriſdiction within flood-mark; and ſecondly, that that juriſdiction is privative: for the firſt, he refers to the following authorities. Preſident Balfour, p. 629, in the reign of queen Mary: Melvil, p. 10, and 11; and Craig, old edition, p. 378. In the reign of king James VI, Sir George Mackenzie, p. 197: and Stair, p. 675, in the reign of Charles II. the ſtatute 1681, and Bankton, Vol. II. p. 540, who wrote lately. The ſecond propoſition is proved, firſt, by the nature of juriſdiction in Scotland; ſecondly, by the nature of the admiral's juriſdic-

tion; and laſtly, by authorities of the Scots law. With regard to the firſt of theſe, upon the conqueſt of the Roman provinces by the feudal nations, the old juriſdictions were aboliſhed, and new ones eſtabliſhed. All theſe new juriſdictions were bounded by territorial lines, and were privative in the firſt inſtance, though ſubject to the review of the king's courts: the baron, the ſheriff, the bailie of a burrow, the lord of regality, and the proprietor of a private juſticiary, all judged the people living within their reſpective bounds, and were privative of other courts, the abſolute proof of which is, that they could repledge their people from each other, and from the king's courts. Quon. Attach. cap. 4. Balfour, p. 48. Stat. 1488. cap. 1. Leg. Burg. 35, and c. 1. Iter. Juſt. p. 12. Nay, and the people were puniſhed if they ſubmitted to any other juriſdiction than their own. Quond. Attach. cap. 27. Book I. cap. 32. Balfour, Tit. Judges. Theſe original juriſdictions would have continued for ever privative, had not the king's courts been made cumulative with them by ſtatute. The ſupreme civil courts of the ſeſſion, next of the daily council, and laſtly, of the council and ſeſſion, were all made cumulative by different ſtatutes; and in the ſame way the ſupreme criminal court, that of the juſticiary was made cumulative with the original juriſdictions, otherwiſe they muſt have continued privative to this day. The admiralty juriſdiction was originally in the family of Lenox, and paſt by ſucceſſion to the crown, as heir to that family. It was bounded by a territory, viz. the flood-mark; and it could ceaſe to be privative only, by one or two ways, either in quality of the original creation, or a ſtatute, making the juriſdiction of the common-law courts cumulative with it, neither of which was the caſe here. Secondly, a ſecond proof from the nature of juriſdiction, is, that the writ of no other court can be executed in the bounds of the admiral; no horning, caption, poinding, and arreſtment, or warrant of the court of juſticiary, can go into his bounds without his concurrence. The court of juſticiary cannot have a juriſdiction where it cannot execute any writ. Again, the juriſdiction in queſtion is privative, from the nature of the admiralty juriſdiction. The juriſdictions ariſe from the neceſſities and intereſts of trade, for nations at firſt would not trade with each other, unleſs queſtions, which aroſe betwixt traders, were to be decided by the law of nations which they knew, and not by the municipal law which they did not know; and unleſs their perſons, when they went to the ſeas and the harbours on the coaſts of the foreign country were to be judged by a judge who proceeded upon the law of

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nations. Laſtly, the authorities of the Scotch law ſhowed the juriſdiction to be privative. Balfour ſays ſo, p. 629, Melvil, p. 10, and 11, &c. Lord Stair, p. 675. for in this laſt author, the word *proper* involves in it *property*; it is applied and repeated to four different courts, all of which have a property in their own juriſdictions, and are privative of all other, *quoad* the objects which lord Stair aſſigns to them; but the act 1681 puts the matter out of doubt, as will appear from the admiral's juriſdiction; for there is no knowing the law, without knowing the hiſtory of the law. It was originally privative; but as there was only one judge, with a trifling influence for his trouble, and he, often modeſt and diffident, he applied, in difficult caſes, to the king and council for aſſiſtance; they ordered the court of juſticiary to aſſiſt them, Mackenzie, p. 193. From thence the court of juſticiary came to give him aſſiſtance where it was not aſked, Balfour, p. 634. Melvil, p. 10. And thus the court of juſticiary came, before the act 1681, to take upon them to proceed, though unwarrantably, as if they had been cumulative with him. Mackenzie.

In the year 1681, the duke of York came to Scotland, to take the adminiſtration of it. He was the king's commiſſioner to the parliament, and lord high admiral of Scotland. Among many vices he had one virtue: he was fond of naval affairs and of trade. The acts of the parliament 1681 ſhow his attention to theſe objects; and, among others, the act in queſtion, for the diſadvantages to trade of encroaching upon the privative juriſdiction of the admiral being obvious, this act was a remedy for thoſe encroachments, and declared the original privative juriſdiction of the admiral. At that time the duke of York was in cloſe connections and correſpondence with Lewis XIV. and the act in queſtion was borrowed from an ordonance of that prince. The dates ſhow this, for the act is dated a month after the ordonance. The preambles ſhow it, for the ſubſtance of both is the ſame, though there is more *verbiage* in the French preamble; and the enactment is the ſame, for they both declare the criminal juriſdiction of the admiral, and that that juriſdiction ſhall be privative; ſo that the two acts muſt have been concerted together. Moreover, the act 1681 declares the admiral's juriſdiction to be *ſovereign*, which draws this conſequence after it, that it muſt be privative, for there is no ſovereignty without independance of the other four ſovereign courts in Scotland; the ſeſſion, juſticiary, exchequer, and parliament, conſidered as a court are all privative. It declares too the admiral to be *juſticiary in the high ſeas*; but every court

court of juſticiary is in its own nature privative. The juſticiary of all Scotland in the hands of the Argyle family was privative till bought off. The juſticiary which they retained over Argyleſhire after the ſale, continued privative; the Highland juſticiaries were privative; the preſent court of juſticiary is privative upon the land, and upon the ſame plan of analogy; the juſticiary of the admiral muſt be privative in his bounds, *viz.* the ſea, the harbours, and the coaſts. Such are the heads or ſubſtance of the arguments and authorities, proving that the admiral's juriſdiction is privative and excluſive of that of this court, at leaſt in the firſt inſtance; but as the queſtion is of conſiderable importance to the conſtitution of both courts, and to the people of this country, as well as foreigners, it would be neceſſary that the court ſhould appoint informations to be given in upon it, in order that the matter might be treated as fully as it requires, and conſidered with due deliberation.

Mr. Dalrymple further repreſented, That having written the foregoing reply without ſeeing the anſwer made on the part of the proſecutor, or having acceſs to any of the writs and manuſcript authorities referred to by the proſecutors counſel in the debate, he will be forgiven if he has omitted to anſwer any argument that may be there ſtated; and hopes it will be marked in the record of court, that his reply was drawn under theſe circumſtances.

Mr. Ilay Campbell anſwered, That both parties were in the ſame ſituation, having made up their minutes from the notes which they took of the pleadings, and there was no occaſion for any inſpection of each other's minutes.

Curia

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh, vigeſimo ſecundo die Decembris milleſimo ſeptingenteſimo & ſexageſimo nono per Honorabiles viros Thomam Miller de Barſkimming dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Henricum Home de Kaimes, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, & Robertum Bruce de Kennet, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime Affirmata.

INTRAN. MUNGO CAMPBELL, exciſe-officer at Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

Parties procurators preſent as in laſt Sederunt.

The lord juſtice-clerk, and lords-commiſſioners of juſticiary having conſidered the debate *viva voce* at their laſt ſederunt and foregoing minutes, they find, That the court has juriſdiction to try this indictment in the firſt inſtance, and therefore declare, That they will proceed accordingly.

(Signed) THO. MILLER, J. P. D.

The indictment being again read over in open court, and the pannel being interrogate, If he was guilty or not guilty, he anſwered, That he was not guilty.

Mr. Robert Cullen, on the part of the pannel, and Mr. Andrew Croſbie, on the part of the proſecutor, being heard at great length on the relevancy of the indictment, the lord juſtice-clerk, and lords commiſſioners of juſticiary, continue the diet at the inſtance of Archibald Earl of Eglintoun, and his Majeſty's advocate, againſt the ſaid Mungo Campbell, pannel, and whole other diets of court till to-morrow at twelve o'clock, in this place; ordain parties, witneſſes, aſſizers, and all concerned, then to attend, each under the pains of law; and the pannel in the meantime to be carried back to priſon.

Curia

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh, vigeſimo tertio die Decembris milleſimo ſeptingenteſimo & ſexageſimo nono per honorabiles viros Thomam Miller de Barſkimming, dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Henricum Home de Kaimes, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, & Robertum Bruce de Kennet, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime affirmata.

INTRAN. MUNGO CAMPBELL, exciſe-officer, at Saltcoats in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

Parties procurators being further heard at great length on the relevancy of the indictment,

The lord-juſtice-clerk and lords-commiſſioners of juſticiary, ordain both parties to give in to the clerk of court, informations upon the debate, in order to be recorded; the proſecutors to give in theirs againſt Wedneſday the third day of January next to come; and the procurators for the pannel to give in his againſt Tueſday the 16th day of the ſaid month; continue the diet againſt the pannel, and whole other diets of court till Monday the twenty-ſecond day of the ſaid month of January; and ordain parties, witneſſes, aſſizers, and all concerned, then to attend, each under the pains of law; and the pannel in the mean time to be carried back to priſon.

*** *See the above-mentioned* INFORMATIONS, *printed at large, at the end of this Trial.*

Curia

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh vigeſimo ſecundo die Januarii milleſimo, ſeptingenteſimo & ſeptuageſimo per Honorabiles viros, Thomam Miller de Barſkimming dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Henricum Home de Kaimes, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, et Robertum Bruce de Kennett, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime Affirmata.

INTRAN. MUNGO CAMPBELL, officer of exciſe at Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

The lord juſtice-clerk, and lords commiſſioners of juſticiary, having conſidered the criminal indictment, raiſed and purſued at the inſtance of Archibald Earl of Eglintoun, brother-german to the deceaſed Alexander Earl of Eglintoun, with concourſe, and alſo at the inſtance of James Montgomery, Eſq. his Majeſty's advocate for his Majeſty's intereſt, againſt Mungo Campbell, Exciſe-Officer at Saltcoats, in the county of Air, pannel, with the debate and informations thereupon, they find the indictment relevant to infer the pains of law;—but allow the pannel to prove all facts and circumſtances, that may tend to exculpate him from the crime charged, or alleviate his guilt; and remit the pannel, with the indictment as found relevant, to the knowledge of an aſſize.

(Signed) THO. MILLER, J. P. D.

The lord juſtice-clerk, and lords commiſſioners of juſticiary, continue the diet at the inſtance of Archibald Earl of Eglintoun, and his Majeſty's advocate, againſt the ſaid Mungo Campbell, pannel, and whole other diets of court, till Monday the fifth day of February next, at eight o'clock in the morning, in this place; ordain parties, witneſſes, aſſizers, and all concerned, then to attend, each under the pains of law, and the pannel in the mean time to be carried back to priſon.

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh quinto die Februarii milleſimo ſeptingenteſimo et ſeptuageſimo per Honorabiles viros Thomam Miller de Barſkimming dominum juſticiarium clericum, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, et Robertum Bruce de Kennett, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime Affirmata.

INTRAN. MUNGO CAMPBELL, officer of exciſe at Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

The lord juſtice-clerk, and lords commiſſioners of juſticiary, continue the diet at the inſtance of Archibald Earl of Eglintoun, and his majeſty's advocate, againſt the ſaid Mungo Campbell, pannel, and whole other diets of court, till Monday the 26th day of February inſtant, at eight o'clock in the morning, in this place; ordain parties, witneſſes, aſſizers, and all concerned, then to attend, each under the pains of law, and the pannel in the mean time to be carried back to priſon.

(Signed) THO. MILLER, J. P. D.

Curia

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh vigeſimo ſexto die Februarii milleſimo ſeptingenteſimo et ſeptuageſimo per Honorabiles viros Thomam Miller de Barſkimming dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Henricum Home de Kaimes, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, et Robertum Bruce de Kennett, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime Affirmata.

INTRAN. MUNGO CAMPBELL, officer of exciſe at Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

The Interlocutor of relevancy being read over,

The lord juſtice-clerk, and lords commiſſioners of juſticiary, fine and amerciate Robert Sandilands of Herdmonſhiels, and Alexander Kincaid, Bookſeller in Edinburgh, each in the ſum of one hundred merks Scots, for not attending this day and place, to have paſt upon the aſſize of the ſaid Mungo Campbell, as they were lawfully cited for that effect, thrice called, and not compearing.

Mr. Maclaurine, for the pannel, repreſented, That the liſt of the perſons to paſs upon the aſſize had been made up by the clerk of court, who was in uſe to make up ſuch liſts; but that it would not be diſputed, that before making up the ſaid liſt, the doer for the private proſecutor had ſuggeſted to the clerk, that he was deſirous a number of landed gentlemen ſhould be upon ſaid liſt. That the clerk made up the liſt accordingly, which was laid before, and approved of by the judges; but that it would not be diſputed, that before the judges, at leaſt before it was ſigned by them, the ſaid liſt had been ſhown to, and approved of, by the doer, for the private proſecutor, at whoſe ſuggeſtions alterations had been made thereon. That he apprehended, in order to make a trial by a jury ſafe and fair, it is abſolutely neceſſary that the proſecutor ſhould have no concern in the nomination of the aſſize, or be allowed to ſuggeſt any particular perſon, or any

particular ſet of men, however reſpectable, to the clerk, as proper perſons to be put upon the liſt; becauſe, if that was allowed, an advantage might be taken of pannels, as perſons may be put upon the aſſize, who, from certain circumſtances and ſituations, may have prejudices againſt the pannel; and that, therefore, when any ſuch thing appeared, he apprehended, a liſt ſo made up ſhould be laid aſide, and another aſſize called; and that in this caſe, as it was not diſputed, and if diſputed, could be eaſily and inſtantly proved, that the doer for the private proſecutor had ſuggeſted to the clerk, that a number of landed gentlemen ſhould be put upon the jury, which was accordingly done, though not neceſſary in this caſe, as the pannel was not a landed man; and that the liſt of the aſſize had been ſhown to, and approven by the doer for the private proſecutor, he apprehended that a challenge lay againſt the array, or the whole aſſizers ſummoned.

Whereupon Mr. George Muir, principal clerk of court, being called upon by the court, and aſked, Whether what was ſet forth by Mr. Maclaurine was the truth?—He informed the court, that after he had made up a liſt of aſſizers in the uſual manner, to be laid before the judges for their conſideration, he being then confined to the houſe by indiſpoſition, —Mr. John Mackenzie, writer to the ſignet, agent for the proſecutors, happened to call upon him; and he having ſhewed him the liſt for the jury he had made up, which then conſiſted of more than forty-five perſons, Mr. Mackenzie obſerving the names of Sir William Cunningham, and Sir Robert Myreton among the jurymen, told him, he thought theſe improper perſons to be in the liſt of jurymen, on account of their near connection with the Earl of Eglintoun the private proſecutor; Sir William Cunningham being nephew to the Earl of Eglintoun, and Sir Robert Myreton father-in-law to Sir William.——Whereupon he ſtruck out the names of theſe two gentlemen: that this converſation was merely accidental, and he does not think that he had any other converſation with Mr. Mackenzie on the ſubject, previous to the liſt being ſigned by the court; that in particular, Mr. Mackenzie did not deſire him to take the jurymen from any claſs whatever.

Mr. Lockhart for the proſecutor thereupon moved, that as there was no relevancy in the objection to the liſt of aſſize, which is the act of court, not of the clerk, and, in this caſe, no impropriety on the part of the clerk, that therefore the objection ought to be repelled.

The

The lord juſtice-clerk, and lords commiſſioners of juſticiary, having conſidered the foregoing objection, with what has been declared by the clerk of court, they repel the objection, and ordain the trial to proceed.

(Signed) THO. MILLER, J. P. D.

The lords then proceeded to name the following perſons to paſs upon the aſſize of the ſaid pannel.

Hugh Dalrymple, of Fordell.
Wm. Tytler, of Woodhouſlee.
John Chriſtie, of Baberton,
Alex. Sherif, of Craigleith.
James Finlay, of Wallyfoord.
John Buchan, of Lathem.
Tho. Sharp, younger of Houſton.
Henry Lindeſay, merchant in Edinburgh.
Wm. Maghie, merchant there.
Robert Arthbuthnot, banker there.
Peter Robertſon, goldſmith in Edinburgh.
James Hunter, banker in Edinburgh.
Arch. Hart, merchant there.
John Fife, banker in Edinburgh.
Walter Hamilton, merchant there.

Who being all lawfully ſworn, and no objection on the contrary,

The proſecutor for proof of the libel proceeded to adduce the following witneſſes.

ANDREW WILSON, Wright, in Beith, aged forty years and upwards, married, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That upon Tueſday the 24th day of October laſt, he being then employed in ſome part of the late lord Eglintoun's work, attended his lordſhip from Eglintoun to Ardroſſan and Fairly, where his lordſhip intended to go—That his lordſhip was alſo attended that day by John Milliken, John Hazle, John Cooper, and James Hutcheſon, his lordſhip's ſervants. That they left Eglintoun after breakfaſt, and ſtopt ſome time at Parkhouſe, to the weſt, or northweſt of Saltcoats, where they were joined by Alexander Bartleymore,

leymore, another of his lordſhip's ſervants, who, at his lordſhip's deſire, followed them from that place. Depones that at this time lord Eglintoun was in a coach, and the reſt of the company on horſeback—That after they had got betwixt a quarter and half a mile from Parkhouſe on the road to Fairly, one of the ſervants, and, as he thinks, John Milliken ſaid to my lord that he obſerved ſome more ſhooters, as they had obſerved other ſhooters that day, upon his lordſhip's grounds. That the deponent endeavoured to divert his lordſhip from taking any notice of them, as they had a pretty long ride in view that day. That his lordſhip aſked his ſervants, if they knew who it was; to which Alexander Bartleymore anſwered, that one of them, he believed, was Mungo Campbell: upon which his lordſhip came out of the coach, and mounted a horſe, which was led by one of his ſervants, and rode towards the place where theſe perſons, who were two in number, were. That at this time theſe two perſons were retiring from the grounds where they were firſt obſerved, towards the ſands of the ſea. That lord Eglintoun rode up to them, and the deponent and John Hazle followed; and the deponent was cloſe by his lordſhip when he came up with Mungo Campbell, the pannel, whom he now knows at the bar, but had never ſeen him before that day. That Mr. Campbell had a gun in his hand, but the other perſon who was along with him had no gun; nor did the deponent know who he was, but now underſtands that it was John Brown, tide-waiter, whom he has ſeen this day among the witneſſes. That my lord Eglintoun came up within ten yards, or thereby, of Mr. Campbell, before he accoſted him, and then ſaid, "Mr. Campbell, I did not expect to have found you ſo ſoon "hunting upon my grounds, after your promiſe "when you ſhot the hare." And demanded Mr. Campbell's gun, which he refuſed—upon which my lord, having neither whip nor ſpurs, gave his horſe a kick, in order to get nearer the pannel; upon which

the pannel retreated backwards ſome ſteps, and deſired my lord to keep off, and at the ſame time preſented, or rather pointed his gun towards lord Eglintoun, but did not raiſe it to his ſhoulder—That Mr. Campbell had his hand upon the lock, but the deponent did not obſerve whether the gun was cocked or not; upon which lord Eglintoun ſtopped his horſe, and ſmiling ſaid to the pannel "Are you going to "ſhoot me?" and thinks that at that time, but is not certain, the pannel anſwered, that he would if he did not keep off. That though he heard the pannel afterwards threaten he would ſhoot lord Eglintoun, he is not ſure whether he ſaid ſo at that time. That lord Eglintoun diſmounted from his horſe, and ſaid, "if he had his gun he could ſhoot pretty well too, "or that he would ſhoot as well as *you*," meaning the pannel; and he is uncertain whether his lordſhip uſed theſe words immediately before diſmounting, or immediately after; but preſently after uttering theſe words he calls to his ſervant, "John, bring me my "gun." That lord Eglintoun's coach was then upon the high road, about three hundred ells diſtant from where his lordſhip then ſtood, and he knows lord Eglintoun had a gun in the coach. That, after giving the above order, lord Eglintoun advanced towards the pannel ſome ſteps, leading his horſe in his hand, and repeated times deſired the pannel to deliver up his gun, which the pannel continued to refuſe. That my lord dropt the horſe's bridle from his hand, and the deponent took hold of the horſe. That his lordſhip ſtill continued to advance towards the pannel, and the pannel retired ſometimes backwards and ſometimes ſideways, but always pointing his gun towards lord Eglintoun in the manner above deſcribed, and about this time he heard the pannel ſay, "I beg your pardon my lord"—To which my lord replied, "Well then, deliver me your gun;" and to which the pannel again anſwered, "I beg pardon, "my lord, I will deliver my gun to no man;" and

he

he thought that the pannel ſeemed to be in anger at this time; but as he was not acquainted with the man before, he can ſay nothing further upon the appearance of his anger. And further depones, That when Campbell uſed the above words, and when my lord was ſtill advancing, he heard the pannel ſay, "Keep "off my lord, or by God I will ſhoot you." That after this there was ſome words paſt between my lord and the pannel; but as the deponent was then about twenty yards behind my lord, holding his horſe, he did not hear what paſt betwixt them, excepting that he heard ſome mention of property, by both of them, but could make no ſenſe of it. That at this time Alexander Bartleymore was come up, and he heard him ſay to the pannel "For God's ſake, Mr. Campbell, "deliver up your gun to my lord;" but did not hear what anſwer the pannel made; and the deponent about the ſame time made the ſame requeſt to the pannel to deliver up his gun to my lord, but either he did not hear him or he made no anſwer. Depones, That during all the time of the pannel's retreating and pointing the gun, as above deſcribed, he always had his thumb upon the cock, at leaſt ſo often as the pannel was in ſuch a ſituation as the deponent could obſerve it, and always obſerved the gun pointed towards my lord, as above deſcribed: and further depones, That when the pannel was retiring and my lord advancing, in the manner above deſcribed, the pannel fell backwards by a ſtone upon which he ſtruck his foot, by which the gun was raiſed paſt the perpendicular, and rather pointing backwards from my lord, the pannel being then lying upon his back: upon which my lord ſtopt for a little, and then moved his left foot as if intending to paſs by Mr. Campbell's feet; upon which the pannel raiſed himſelf upon his elbow, pointed the gun at my lord Eglintoun, and fired it into his body; and that my lord, at the time he received the ſhot, was not above three or four yards from the muzzle of the gun. That the

ſhot

ſhot entered his left ſide, owing, as he apprehends, to the poſture his lordſhip was in by the movement he made as above-deſcribed—Depones, that my lord walked ſome ſteps after receiving the ſhot towards the ſhore, with his hand upon the wound; and as he paſſed near to the deponent, he looked to him and ſaid, he was gone—That preſently after he ſaw the pannel engaged with John Milliken, and endeavouring to wreſt out of his hands the gun which Milliken had brought from my lord's coach—That he had not obſerved this gun before that time.—That, upon obſerving this ſtruggle, he called to Bartleymore to go to Milliken's aſſiſtance, for, that that man would ſhoot more of them; which Bartleymore accordingly did, and prevented the pannel's getting poſſeſſion of the gun. That the ſervants, and the deponent, afterwards tied the pannel's hands, and before this time the deceaſed lord called out to his ſervants, "Don't "uſe him ill."—That the deponent deſired the pannel to go towards my lord, who was then lying upon the ground, with his ſervants about him.—That Campbell accordingly walked up, and my lord looking at him ſaid "I would not have ſhot you, ſuppoſe "you have ſhot me," and again repeated—"I would "not have ſhot you."—Depones, That at the time that the pannel fell backwards the deponent thought my lord might have taken the gun from him, becauſe he was ſo near the pannel, and the pannel was ſome time before he recovered himſelf; but he heard no body adviſe my lord to make uſe of that opportunity of ſeizing the gun. Depones, That after aſſiſting to carry lord Eglintoun to his coach, the deponent, with one John Hamilton, who had joined them, after my lord had got into the coach, conducted the pannel as a priſoner to Saltcoats. That upon their way thither the deponent aſked the pannel what ſhot his gun was charged with.—To which the pannel anſwered "It did not ſignify, as *he* had got as much as would "do for him if he were all the earls in Scotland."

But upon the deponent's ſaying that he might ſatisfy him ſo far as to tell him what the gun was loaded with, he ſaid it was loaded with ſmall ſhot.—That the deponent afterwards aſked him if he was not ſorry for what he had done; anſwered "No, for I will yield "my gun to no man, and would rather yield my life;" and thinks he added theſe words "That if it was to "do he would do it again rather than part with his "gun; for that he would rather part with his life "than his gun;" and he further added, "That if "lord Eglintoun's gun had not been wrong he would "probably have ſhot another." And being interrogate for the pannel, depones, That when my lord was advancing upon the pannel, he frequently obſerved his lordſhip turning from the one ſide to the other, in order, as he underſtood, to avoid the direction of the pannel's gun, and he as often obſerved the pannel change the direction of the gun ſo as to keep it pointed at the earl: and being deſired to explain further in what manner the gun was pointed towards the earl, he again deſcribed it before the jury as raiſing the butt-end of the gun a little above his haunch, and the muzzle of the gun a little upwards, pointing towards the earl. And further depones, That when the pannel fell backwards over the ſtone, he ſaw his heels riſe from the ground by the violence of the fall; and depones, that after the earl firſt accoſted the pannel, the pannel retired, as he thinks, about forty yards ſtraight backwards.—But that it would have been more by his retiring ſometimes ſideways—Depones, that when the earl received the ſhot, the deponent was above twenty yards from him, holding the horſe, which the earl had rode, he himſelf being mounted on his own horſe. Depones, that he did not ſee the pannel riſe from the ground after the earl received the ſhot, but afterwards he ſaw the pannel's gun lying upon the ground near the place where he had fallen.—That he ſaw no ſtrokes given by any perſon to the pannel, except one by John Milliken,

and

and at that time he apprehended that the pannel had wreſted, or nearly wreſted, the earl's gun out of Milliken's hands, which he could not exactly obſerve, as Milliken was betwixt him and the pannel; but conjectured it to be ſo from Millken's giving the above blow: and depones, That, being at the diſtance abovementioned, he neither obſerved the pannel cock the gun, or draw the trigger. And being interrogate by one of the jury, whether he heard lord Eglintoun call the pannel a ſcoundrel, raſcal, or give him any bad names, or curſe or damn him, from the time that my lord firſt accoſted him? depones, That he did not. Depones, That ſome time after my lord had accoſted the pannel, and demanded the pannel's gun; and he had refuſed to deliver it, my lord ſeemed to be in a paſſion. Depones, That when the pannel was carried to Saltcoats his hands were tied behind his back, and he obſerved a little blood upon his brow, but he obſerved no wound. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God—And further depones, that he did not obſerve when the gun was brought from lord Eglintoun's coach; that after his lordſhip received the ſhot he kept his eye cloſe upon him, and did not obſerve ſaid gun till he ſaw Milliken and the pannel ſtruggling about the gun, as above deſcribed; and that Milliken that time was about twelve yards diſtant, as he thinks, from the place where the earl received the ſhot: and this is alſo truth as he ſhall anſwer to God.

(Signed) ANDREW WILSON.

THO. MILLER.

JOHN HAZLE, late ſervant to the deceaſed Alexander earl of Eglintoun, aged about twenty-two years, married, who being ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That he was ſervant to the deceaſed earl of Eglintoun in the end of October laſt, and attended him when his lordſhip ſet out from his own houſe in his coach, with an intention to go to Southennan. That having come to Parkhouſe the earl came out of his coach, and went into his ſtables to look at his horſes, and then went back to his coach, and proceeded to go on in the above road: and being about a quarter of a mile from Parkhouſe, ſome of his ſervants informed him, That they ſaw two men upon his lordſhip's grounds, and one of them had a gun. After which another ſervant, as the deponent thinks Alexander Bartleymore, ſaid to my lord, that one of them was that Campbell, meaning the pannel.---After which my lord came out of his coach, and mounted the horſe which the deponent was leading, and rode towards the two men; and Andrew Wilſon followed him, and the deponent a little behind. When my lord came up to the pannel, he aſked him to give up his gun, which the pannel refuſed.---At leaſt theſe were the firſt words the deponent heard paſs betwixt them; though, as my lord was with the pannel ſome little time before, other words might have paſt which the deponent did not hear.—That my lord having ſtept forward to lay hold of the gun, the pannel ſtept back, holding the gun in his hand pointed towards my lord's body, and ſaid, if he did not ſtand off he would ſhoot him.—That he did not obſerve whether the gun was cocked or not, but he obſerved the pannel's finger upon the trigger.—That the earl ſaid, if he had his gun there he believed he could ſhoot as well as the pannel, and then ſent the deponent for the gun; and the deponent went and took the gun out of the coach, and delivered it to John Milliken, and bid him ride as faſt as he could with it to my lord; and the deponent followed him

him on horſeback. And when he was come up, he obſerved the pannel retiring backwards with his gun in his hand, and his finger on the trigger, and the muzzle pointed to the earl; and the pannel, having kicked his heel againſt a ſtone, fell backwards, and the gun flew up and his heels flew up.—That the earl upon that did not advance, but ſtood ſtill and ſmiled; after which the pannel raiſed himſelf, leaned upon his right elbow, and then levelled his gun at my lord's body, and then ſtopt ſome time: and my lord was proceeding to go round the pannel's feet towards his head, as he thinks, and was about a yard and a half, or two yards, from the muzzle of the gun; and he ſaw the pannel point the gun at my lord, and ſaw the gun fired into my lord's body; but did not obſerve whether the pannel's finger was upon the trigger or not. After which my lord ſaid, that he was gone, and moved a little way from the place and laid himſelf down upon the ground.—That after this the pannel roſe up, and went to John Milliken, and took my lord's gun from him, and pointed it at the deponent to ſhoot him, and then pointed it to John Milliken. And the deponent knows that the earl's gun was not charged at the time, but it was primed by Milliken after he took it out of the coach.—That Alexander Bartleymore and Andrew Wilſon came to John Milliken's aſſiſtance, and threw down the pannel to the ground, and took the earl's gun from him; and John Milliken gave him two or three ſtrokes; and he heard the earl cry out, that they ſhould not hurt the pannel, but ſecure him, and let the law take place. After which John Milliken was diſpatched to Saltcoats for a doctor, and Bartleymore and Wilſon tied the pannel's hands behind his back with a garter, and brought him to the place where the earl was; and he heard his lordſhip ſay to the pannel, "Campbell, you have "ſhot me, which I would not have done to you." To which the pannel made no anſwer. That the earl had no arms, nor ſtaff, nor whip, nor any thing elſe

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in his hands, from the time he firſt came up to the pannel, 'till he received the ſhot. And that he did not grapple with the pannel, or uſe any harſh expreſſions to him. That the earl upon this went into the carriage, and the deponent went to Irvine for a doctor, and heard no more of what paſt. And being interrogate for the pannel, depones, That the deponent was ſitting on horſe behind my lord about fifteen yards or ſo when the gun was fired.—And being interrogate how he obſerved my lord ſmiling at Campbell's fall, depones, That my lord turned about towards the deponent, and he ſaw him ſmile. And being further interrogate, When he ſaw Milliken prime the gun, depones, that it was after he carried it down to the ſands. And being further interrogate, Whether any powder and ſhot was brought by the deponent out of the coach? depones negative. But he does not know whether Milliken had any ſhot with him. —And that Milliken was about twenty or thirty yards from the earl when he primed the gun. And being further interrogate for the pannel, depones, That the earl's gun was brought within twenty or thirty yards of his lordſhip when the pannel fell: and that it was about the ſame diſtance when the pannel's gun was fired. And depones, That he is now ſervant to Archibald earl of Eglintoun, but is ſoon to leave him. *Cauſa ſcientiæ patet.* And this is truth, as he ſhall anſwer to God. And depones he cannot write.

(Signed) JAMES FERGUSON.

JOHN MILLIKEN, late ſervant to the ſaid deceaſed Alexander earl of Eglintoun, now reſiding at Eglintoun, aged forty years, unmarried, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That a ſervant of the late lord Eglintoun's, named John Hazle, came riding back from the earl at the time and place mentioned in the indictment, and deſired the deponent to carry

my lord Eglintoun's gun to him, which happened to be in the coach: that the deponent did accordingly; but before he had time to charge the gun, which he knew was not charged, he heard and ſaw the ſhot from the pannel's gun, by which his maſter was killed.——That he knows my lord's gun was not charged, becauſe it was his the deponent's buſineſs to look after my lord's arms, and to carry the ammunition. Depones, That when he came near the earl as aforeſaid, he heard the pannel ſay, That by God he would ſhoot the earl, if he were the beſt earl in the nation; and adds, That he heard no words from the earl at that time.—Depones, That when the earl was ſhot, he, the deponent, was at the diſtance of twenty yards from him. Depones, that he went up to my lord after he was ſhot, and my lord ſaid, "I am done "for." That next he attacked the pannel, ſtruck him, and threw him down. That the pannel attempted to wreſt the gun out of his hands, and did not ſucceed, though he was very near it. The earl at the ſame time called to the deponent to let the pannel alone. Depones, That Alexander Bartleymore aſſiſted him in the ſtruggle with the pannel. And that the deponent was ſoon thereafter ſent for a ſurgeon to his maſter: but before he went he left his maſter's gun lying upon the ground. That when he returned with the ſurgeon, he ſaw the pannel with his hands tied behind his back; and that they were not ſo tied when he went for the ſurgeon. And upon an interrogatory in behalf of the pannel, depones, That he was about to charge my lord's gun, when the ſhot from Campbell's gun went off. *Cauſa ſcientiæ patet.* And this is the truth, as he ſhall anſwer to God.

(Signed) JOHN MILLIKEN.

HENRY HOME.

ALEX-

ALEXANDER BARTLEYMORE, in Parkhouſe of Ardroſſan, aged thirty-ſix years, married, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That upon the twenty-fourth day of October laſt the deponent was attending the late earl of Eglintoun; and having paſſed a place called Parkhouſe at about a quarter of a mile diſtance therefrom, a man was obſerved in the fields with a gun, attended by another without a gun, both of them being upon my lord's grounds. That my lord having enquired who it was that was carrying the gun, the deponent told him that it was the pannel. That upon this my lord, along with Andrew Wilſon and John Hazle, went towards theſe men; my lord having come out of his coach, and got on horſeback for that purpoſe. That the deponent ſtaid by the coach for ſome time, but thereafter came up to where my lord was, and obſerved the pannel preſenting his gun at my lord; and the deponent begg'd the pannel, for God's ſake, to give his gun to my lord Eglintoun; but the pannel ſaid he would not, for he had a right to carry a gun. That the earl ſaid to him, That he might have a right to carry a gun, but not upon his lands, without his liberty.—That the pannel upon this ſaid to the earl, I beg your lordſhip's pardon: or, I beg your pardon.—That at this time lord Eglintoun was diſmounted from his horſe, and advancing nearer the pannel, who again was retiring ſometimes backwards, at other times ſideways, having his muſket ſtill pointed at the earl. But the deponent did not obſerve whether he had his hand upon the cock or not; neither did the deponent hear any threatnings uſed by the pannel againſt the earl. Depones, when the pannel was retreating, he fell cloſe by where the deponent was ſitting on his horſe, and by his fall frightened the deponent's horſe, ſo that the horſe reeled a little; during which time the deponent did not obſerve the pannel, but immediately thereafter, having got his horſe ſettled, he ſaw the pannel half

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ſitting half lying, and ſaw him point his gun towards lord Eglintoun, and immediately fire it.—That at this time lord Eglintoun was within two or three yards of the pannel. That upon this lord Eglintoun gave three or four loud cries, that he was gone. Depones, that the pannel fired his gun without putting it to his ſhoulder, but raiſed the butt above his haunch, and pointed it at the earl. Depones, that he having gone up to give what aſſiſtance he could to the earl, he heard ſomebody cry, that the pannel would ſhoot more people. Upon this the earl deſired the deponent to go and take care of the man, for he had ſhot him already.—That the deponent upon this left the earl, and ſaw the pannel and John Milliken, one of the late earl's ſervants, ſtruggling about a gun; whereupon the deponent ran up, and found the pannel had wreſted the gun from Milliken. Upon which the deponent laid hold of the pannel, threw him down, and took the gun from him. That after this John Milliken continued with the pannel, and kept him on the ground; and thereafter the deponent aſſiſted in tying the pannel's hands behind his back.—Depones, That at this time the deponent ſaid to the pannel, "Is it "not a ſad thing you would not deliver your gun "to lord Eglintoun, but have ſhot him?"—To which the pannel anſwered, "If I have ſhot him, let me "be hanged for it." Depones, That at the time the pannel fired at the earl, his lordſhip had no arms, neither ſtaff nor whip; and the deponent did not ſee him grapple with the pannel, or hear him uſe any harſh expreſſions to him.—And being interrogate upon the part of the pannel, depones, That when he firſt ſaw the pannel as above-mentioned, he was among ſome whins on lord Eglintoun's eſtate, at a conſiderable diſtance from the lands of Montfodd. *Cauſa ſcientiæ patet.* And this is truth, as he ſhall anſwer to God. And being further interrogate upon the part of the pannel, depones, That when the earl received the ſhot, John Milliken was within twenty or thirty yards

of his lordſhip, as the deponent thinks; and that the deponent did not obſerve John Hazle at that time. Depones, That Milliken and Hazle were ſervants to the late earl of Eglintoun, and are ſervants to the preſent earl, as the deponent is alſo. And this is alſo truth.

(Signed) ALEXANDER BARTLEYMORE.

ALEXANDER BOSWELL.

JOHN BROWN, tide-officer at Saltcoats, aged forty and upwards, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That upon the twenty-fourth of October laſt, the deponent was deſired by the pannel to take a walk with him. That the pannel had a gun, and they paſſed through the grounds of Montfodd, and thereafter croſſed a burn, which is the march between Montfodd and the earl of Eglintoun's property, and went through lord Eglintoun's ground towards the ſea.—That when they were coming along they met with one Mr. Boyes, an exciſeman, who ſaid to them, It ſeemed they did not mind going through incloſures; though at the ſame time the deponent and the pannel had not gone over any dykes, but followed an old kirk-road, there being ſtyles over the dykes to ſuffer people to paſs. Depones, That when they were upon lord Eglintoun's property as aforeſaid, they ſaw a coach not far from Parkhouſe, and ſoon thereafter the earl of Eglintoun came up to them. That when the earl came, he ſaid to the pannel, "Mr. Campbell, why do you carry a "gun upon my grounds, when I took you in a treſ- "paſs before?" And immediately alighted from his horſe, and called to the pannel to deliver him his gun. That the pannel upon this ſaid he was doing his lordſhip no harm, and bid his lordſhip keep off, pointing his gun at my lord.—That the deponent upon this went off, and can give no further account of what

what paſſed. But being interrogate, ſpecially if, while he was preſent, lord Eglintoun uſed any threatenings or bad language to the pannel? depones, he did not. And being interrogate upon the part of the pannel, depones, That he thinks he heard lord Eglintoun deſire one of his ſervants to bring his lordſhip's gun. Depones, That after he had gone off a conſiderable diſtance, he heard the report of a gun. That immediately after this he looked back, and, as he thinks, he ſaw the pannel lying on the ground on his hands, having known him from his cloaths and his white night-cap.—Depones, That the pannel had no dog with him, and ſhot none upon lord Eglintoun's property that day; neither did he upon any other ground; neither did he ſee Mr. Campbell beating buſhes for game. *Cauſa ſcientiæ patet.* And this is truth, as he ſhall anſwer to God.

(Signed) JOHN BROWN.

ALEXANDER BOSWELL.

JOHN MOORE, ſurgeon in Glaſgow, aged forty years, married, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That the deponent was called upon to ſee my lord Eglintoun at his own houſe that day on which he received his mortal wound, in October laſt. That he came there betwixt eight and nine at night.—That when the deponent entered the room where lord Eglintoun was lying in bed, his lordſhip ſaid, I am glad to ſee you, but you can be of no uſe to me now, for it is all over. That the deponent replied, that he hoped it would not be ſo bad, and wiſhed to ſee the wound. That he examined the wound a little time after, and was immediately convinced that it was mortal. That after this lord Eglintoun deſired the deponent to come towards his bed-ſide and ſit down, and ſaid, I did not deſerve this. I gave no provocation to occaſion or deſerve it. That upon this his lordſhip gave the following detail

of the affair: That he had been going that morning in his coach to Ardroſſan, and was informed by one of his ſervants that a man was ſhooting in ſome of his parks. Upon which he came out of his coach and mounted a led horſe, and coming up to the man who had a gun, he told him, he did not take it well of any perſon to kill his game without aſking his liberty, and deſired the man to deliver up his gun, which he refuſed to do; and his lordſhip inſiſting upon it, the man preſented the piece, and threatened to ſhoot him if he perſiſted. —That his lordſhip ſaid, that he alſo could ſhoot very well, if he was for that: and turning to one of the ſervants, he deſired him to go to the coach and bring his lordſhip's gun, which was there.—That while this ſervant was away his lordſhip continued to expoſtulate with the man, and inſiſted on his delivering up his piece; while the man continued retiring, with his face to my lord, he fell backward over ſome ſtones, and immediately recovering he ſhot his lordſhip. That the deponent here interrupted his lordſhip, and ſaid, probably the gun went off by accident when the man fell? At which his lordſhip replied, ſhaking his head, "No, he fired intentionally;" or words to that purpoſe. That at this time the earl was entirely compoſed, and as ſenſible as ever the deponent had ſeen him. That he talked diſtinctly, and did not utter any thing that ſhowed rancour or reſentment againſt the pannel; and that he was perfectly convinced that he would ſoon die of the wound, and was perfectly reſigned to his fate.—That he died that night a little after twelve o'clock. Depones, That next day he opened the body, and found the bowels very much torn from the left ſide, where the wound was, all the way to the right. —That he found many ſmall ſhot within the belly, ſome of them lodged in the liver.—That the circular wound in the ſkin was about three inches below the navel upon the left ſide, and the wounded bowels could be traced obliquely upwards from the external wound to the liver.—That there was a large quantity

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of extravaſated blood in the belly.—That the deponent was very well acquainted with lord Eglintoun before, and that he is poſitive that lord Eglintoun died of that wound. *Cauſa ſcientiæ patet.* And this is the truth, as he ſhall anſwer to God.

(Signed) JOHN MOORE.
JAMES FERGUSON.

Dr. JOHN CUMMING, phyſician in Irvine, aged fifty and upwards, unmarried, purged of malice and partial counſel, ſolemnly ſworn and interrogate, depones, That upon the twenty-fourth day of October laſt, he was ſent for to viſit the deceaſed Alexander earl of Eglintoun, at his houſe of Eglintoun, on account of a wound which he had that day received. That when he come to his lordſhip, he found him in great pain; and he ſaid to the deponent, that he had been murdered by Mungo Campbell, the pannel, in cold blood; for that he had given him no provocation, not having ſaid an uncivil word to him, and having nothing in his hand to hurt him, not even a ſwitch.—That at this time lord Eglintoun appeared to be altogether ſenſible and compoſed.—Depones conform to the preceding witneſs, with reſpect to the nature of the wound; and that it was the occaſion of lord Eglintoun's death; and that he was preſent next day when lord Eglintoun's body was opened. *Cauſa ſcientiæ patet.* And this is truth, as he ſhall anſwer to God.

(Signed) JOHN CUMMING.
ROBERT BRUCE.

GEORGE HUTCHINSON, lieutenant and adjutant of the fourth regiment of foot, aged twenty-nine years, unmarried, ſolemnly ſworn, purged of malice and partial counſel, and interrogate, depones, That about the beginning of October laſt, the depo-

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nent happened to be in company with Mungo Campbell, the pannel, in a houſe of the town of Saltcoats, when the converſation turning on the ſubject of ſport, the pannel ſaid that lord Eglintoun had challenged him for ſhooting on his grounds; and thinks he ſaid that his lordſhip had done ſo oftener than once, and, ſo far as he can remember, thinks it was twice; and that his lordſhip had threatened to take his gun from him, but had not perſiſted in demanding it; and that if he had, the pannel did not know what the conſequence might have been; perhaps he might have fired it, or words to that effect; and added, that he would allow it was a treſpaſs to ſhoot without leave, for which he might be proſecuted; but he knew no right lord Eglintoun had to take his gun on that account: that as an officer of exciſe he looked upon himſelf as entitled to carry arms in the proſecution of his duty. Lieutenant Joſeph Knight was in company with the deponent and Mr. Campbell at this time. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) G. HUTCHINSON.
ROBERT BRUCE.

JOSEPH KNIGHT, lieutenant in the ſaid fourth regiment of foot, aged twenty-nine, unmarried, purged of malice and partial counſel, and ſolemnly ſworn and interrogate, depones, That upon the third day of October laſt, the deponent and lieutenant Hutchinſon, the preceding witneſs, happened to be in company with Mungo Campbell, the pannel, in the town of Saltcoats; and the converſation happening to turn upon ſport, and ſome of them having aſked if there was good game in that neighbourhood, the pannel anſwered that there was, for that moſt of the grounds about the town belonged to lord Eglintoun, and he was ſtrict in preſerving the game. That the pannel alſo ſaid, he had been ſeverely challenged by lord Eglintoun for ſhooting a hare; and that his lordſhip

had on that occaſion either threatened or attempted to take his gun from him, but did not perſiſt in it; and that the pannel had then ſaid to lord Eglintoun, that he would rather die as part with his gun.—That Mr. Campbell further ſaid, and ſwore to it, that if lord Eglintoun had perſiſted to take his gun from him, he would have ſhot him; for that he was an old man, and his life was not much worth, or words to that purpoſe. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God. And further depones, That on the above occaſion the pannel ſaid, that as he was an exciſe-officer, he had a right to carry arms, and would ſhoot any perſon who would attempt to take them from him. That the deponent does not exactly remember whether the pannel only ſaid this to him and lieutenant Hutchinſon, or if he told them that he had ſaid ſo to lord Eglintoun, when demanding the gun as aforeſaid. And this is alſo truth.

(Signed) J. KNIGHT.
ROBERT BRUCE.

JOHN HAMILTON, maſon, in New-houſe, in the pariſh of Ardroſſan, aged fifty-three years, married, purged of malice, and partial counſel, ſworn and interrogate, depones, That upon the twenty-fourth of October laſt, immediately after the late Earl of Eglintoun had received the wound of which he died, the deponent came down to the ſhore where it happened, and aſſiſted Andrew Wilſon, a preceding witneſs, in conducting the pannel to Saltcoats.—That when they were upon the road, the deponent aſked the pannel how that unlucky accident had happened; to which he anſwered, that lord Eglintoun had come to him and demanded the gun, which he had refuſed: that his lordſhip having advanced up to him, had inſiſted for delivery of the gun; upon which he had retreated, and making his retreat, had fallen on the ground. That before this, lord Eglintoun had ſent a ſervant of his

his for his gun; and he thought his life was as good as lord Eglintoun's, and he ſhot him before the gun came.—That the deponent having ſaid to the pannel, that he hoped he was miſtaken, and that poſſibly he might be but ſlightly wounded; to which the pannel replied, that he had received the ſhot when he was within three yards of him, and that he could not live if he was all the lords of Scotland or of Britain: that thereafter the deponent ſaid to the pannel, If you could obtain words of lord Eglintoun, as you ſay that he is a dying man, perhaps in cool blood he might forgive you, which would be a great honour to you. To which the pannel anſwered, that it would avail him nothing, or ſtand him in no ſtead. And further depones, that he thinks that the pannel told him, that he had fallen to the ground before lord Eglintoun ſent for his gun. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) JOHN HAMILTON.
GEO. BROWN.

SAMUEL MITCHEL, ſhoemaker, in Saltcoats, aged fifty and upwards, married, purged of malice and partial counſel, ſolemnly ſworn and interrogate, depones, That upon the twenty-fourth of October laſt, Andrew Wilſon, a preceding witneſs, brought the pannel to the deponent, at the deponent's houſe in Saltcoats, John Hamilton and another perſon being along with him: and that the pannel had then his hands tied behind his back.—That Andrew Wilſon ſaid he had orders to deliver him to the deponent, that he might carry him priſoner to the town of Irvine, for the crime of ſhooting lord Eglintoun.—That the deponent having aſked Andrew Wilſon how that had happened, the ſaid Andrew Wilſon ſaid he was afraid lord Eglintoun was gone, and immediately thereafter the pannel ſaid, "By God it is fact, "I have ſhot lord Eglintoun, and he is gone if he "was all the lords in Scotland."—That the deponent

nent convened a party accordingly, and carried the pannel priſoner to Irvine.—That when they were upon the road to Irvine, the deponent ſaid to the pannel, " that as lord Eglintoun was a young healthy man, " there was reaſon to hope that he might recover." To which the pannel anſwered, " that it was im- " poſſible—that he had received the whole ſhot into " his body, and that he was gone if he was all the " lords in Europe." Depones, That the deponent having ſaid it was pity ſuch an unlucky accident ſhould have happened to ſuch a nobleman, the pannel anſwered, " There is no help for it now; it is only an " old gauger dying two or three years ſooner for a " lord." *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) SAMUEL MITCHELL.
GEO. BROWN.

CHARLES HAMILTON, of Craighlaw, provoſt of Irvine, aged ſixty years, unmarried, purged of malice and partial counſel, ſolemnly ſworn, and interrogate, depones, That upon the twenty-fourth of October laſt, Mungo Campbell, the pannel, was brought to Irvine, and preſented to the deponent as chief magiſtrate of that burgh, in order to be committed to priſon, for ſhooting the late Earl of Eglintoun. That the deponent, in proſecution of his duty, took the examination of the pannel touching the circumſtances of that affair, which he committed to writing; and which declaration was wrote, at his direction, by James Cunningham, and was ſubſcribed by the pannel and the deponent. And being now ſhown to him, he depones it is the ſame declaration which was made by the pannel, taken down in writing, and ſubſcribed by the pannel and him as abovementioned. That it was emitted by the pannel voluntarily and freely; and after being read over to the

pannel, was ſubſcribed by him and the deponent. And the ſaid declaration is now marked by the deponent and lord juſtice-clerk, by their ſubſcribing the ſame. And further adds, That after the declaration was read over to the pannel, holding up both his hands, he ſaid, That it was the truth, as he ſhould anſwer to God. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) CHAR. HAMILTON.
THO. MILLER.

Mr. WILLIAM DUFF, advocate, ſheriff-depute of Air-ſhire, aged years, married, purged of malice and partial counſel, ſworn, and interrogate, depones, That upon the twenty-ſeventh of October laſt, the pannel being then committed priſoner to the Tolbooth of Air, for the murder of the late earl of Eglintoun, the deponent, in the courſe of his duty, took the pannel's examination touching the circumſtances of that caſe, and committed the ſame to writing, which was dictated by him, as expreſſed by the pannel, and was written by John Murdoch, the ſheriff-clerk-depute. That what was therein taken down was emitted by the pannel freely and voluntarily; and being read over to the pannel, was ſubſcribed by him.—That at the ſame time another declaration, which the pannel had emitted before Charles Hamilton, provoſt of Irvine, was read over to the pannel; and he acknowledged that it was the declaration which he had emitted before the ſaid Charles Hamilton: and both theſe declarations being now ſhown to the deponent, depones, that they are the ſame with thoſe above deponed to, ſubſcribed by the pannel, by provoſt Hamilton and the depute, as above deponed to. And the deponent has now ſubſcribed both theſe declarations as herein referred to. And the declaration firſt above-mentioned, bearing date the twenty-ſeventh of October, is alſo ſubſcribed by lord juſtice-

clerk, the other declaration of the twenty-fourth of October being already ſigned by him. *Cauſa ſcientiæ patet.* And this is truth, as he ſhall anſwer to God.

(Signed) WILLIAM DUFF.
THO. MILLER.

JOHN MURDOCH, ſheriff-clerk-depute of Air, aged twenty-nine years, married, purged of malice and partial counſel, ſolemnly ſworn, and interrogate, depones, That he was preſent with Mr. Duff upon the twenty-ſeventh of October laſt, when the pannel emitted a delaration touching the murder of lord Eglintoun. That he wrote the ſaid declaration, which was dictated by Mr. Duff; and concurs with Mr. Duff, in proving that declaration, and likeways the former declaration, which had been emitted by the pannel before Charles Hamilton, provoſt of Irvine: and both declarations being now ſhown him, depones that they are the ſame with thoſe above deponed to. And both declarations are now ſubſcribed by the deponent as herein referred to. *Cauſa ſcientiæ patet.* And this is the truth as he ſhall anſwer to God.

(Signed) JOHN MURDOCH.
THO. MILLER.

The two declarations mentioned in the aforeſaid depoſition were read over in the preſence of the court and jury: and of which the tenors follow:

FIRST DECLARATION.

Irvine, 24th Oct. 1769.

IN preſence of Charles Hamilton, Eſq. of Craighlaw, provoſt of the burgh of Irvine, one of his Majeſty's juſtices of the peace for the ſhire of Air, compeared Mungo Campbell, officer of exciſe at Saltcoats, who being examined, declares, That this

day in the forenoon, or about mid-day, he was walking upon the ſhore betwixt Ardroſſan Park-dyke and Montfodd-burn, with his gun in his hand. That lord Eglintoun came riding up to him, and diſmounted, and aſked the declarant to deliver up his gun; which he refuſed to deliver, and begging my lord pardon if he had done him an injury. That my lord again and again required the gun, and he refuſed; in the mean time retiring from my lord's taking the gun from him, and telling his lordſhip that he had no right to take the gun from him, nor would he give it; but if he had done any wrong, the law was open, and he was willing to anſwer to the law for it. That upon this my lord called to his ſervant to bring him a gun, for he could ſhoot as well as the declarant: while the ſervant was bringing up the gun, the declarant continuing to retire, and having his gun cocked, and his hand at the trigger, he fell back, by a ſtone which he imagined took his foot; and thereupon he ſhot lord Eglintoun. That whenever the declarant got up, he was attacked by two of lord Eglintoun's ſervants; from one of them he twiſted his lordſhip's gun, and had not both the ſervants engaged him cloſely, he does not know what might have been the conſequence, or that he might not have ſhot one of them too, upon his own defence. That the declarant threw away his own gun upon its being diſcharged, and lord Eglintoun's ſervant attacking him. That Mr. Brown, tide-waiter in Saltcoats, Andrew Wilſon, wright in Beith, Alexander Bartleymore in Park-houſe, and two of lord Eglintoun's ſervants, whoſe names he does not know, were preſent during the whole quarrel.

(Signed) MUNGO CAMPBELL.
CHAR. HAMILTON, J. P.

SE-

SECOND DECLARATION.

At Air, the twenty-ſeventh day of October, ſeventeen hundred and ſixty-nine years:

Which day Mungo Campbell, officer of exciſe in Saltcoats, preſent priſoner in the Tolbooth of Air, being brought before Mr. William Duff, advocate, ſheriff-depute of the ſhire of Air, and the declaration which he emitted on Tueſday the twenty-fourth of October inſtant, before Charles Hamilton of Craighlaw, preſent provoſt of the borough of Irvine, and one of his Majeſty's juſtices of the peace for the ſhire of Air, being read over to him, declares, That he voluntarily emitted ſaid declaration, and ſigned the ſame, and ſtill adheres to it, with this addition; That he ſet out from Saltcoats on laſt Tueſday forenoon, in company with —— Brown, tide-waiter in Saltcoats: that they went together the length of Montfodd-bank, and then came down the burn a little way with an intention of finding a wood-cock. —That he croſſed ſaid burn, which divides lord Eglintoun's property from Montfodd, and went to the ſea-ſhore, and was walking along the ſhore within the ſea-mark, looking for a ſhot of plover, when lord Eglintoun came riding up to him; and having diſmounted, demanded the gun, as mentioned in his former declaration. That lord Eglintoun uſed ſeveral harſh expreſſions to him, but no threatenings; nor did the declarant underſtand that he had any further intention than to take the gun from him. That upon lord Eglintoun's demanding his gun, he retired from him, and cocked the gun, and continued retiring for forty or fifty yards, as he thinks, till he fell down, as mentioned in his former declaration. That when he was lying upon the ground, lord Eglintoun came up to him, and graſped at his gun, at which time the gun went off, as mentioned in the ſaid declaration. And this he declares to be truth. This declaration, wrote by

by John Murdoch, ſheriff, clerk-depute of Airſhire, is emitted and ſubſcribed by the ſaid Mungo Campbell, place, day, month, and year of God, aforeſaid,—before theſe witneſſes, Ebenezer Goldie, writer in the ſheriff clerk's office, at Air, and the ſaid John Murdoch.

(Signed) MUNGO CAMPBELL.
(Signed) WM. DUFF.
JOHN MURDOCH, witneſs.
EBEN. GOLDIE, witneſs.

Whereupon the dean of faculty, in behalf of the proſecutor, declared he cloſed his proof.

The following witneſſes were then adduced on the part of the pannel for his exculpation.

But before they were adduced, the counſel for the pannel opened the firſt article of their evidence, which was, That the pannel had a licence for ſhooting upon the grounds of the following perſons in the neighbourhood of Saltcoats, viz. Dr. Hunter of Montfod, John Alexander of Boydſtone, John Reid of Seabank, John Hamilton of Grange, and Patrick Warner of Ardier.

The dean of faculty, as counſel for the proſecutor, rather than detain the court in a proof of facts, which are in no degree material, agrees to hold it for proven, that the five perſons above condeſcended upon, gave ſuch licences to the pannel to ſhoot upon their grounds; but denies that they themſelves had the qualification required by law to entitle them to kill game, or to grant ſuch licences to the pannel.

(Signed) ALEX. LOCKHART.

And a licence from the Earl of Loudon, bearing date the Twenty-eighth of July, One thouſand ſeven hundred ſixty-four, empowering the pannel to hunt upon his lordſhip's muir of Muirkirk, with dog and gun only, being produced, the counſel for the proſecutor admitted, that the ſame was ſubſcribed by the Earl of Loudon, and the ſame was read to the jury.

(Signed) HENRY DUNDAS.

And another licence by Hugh Campbell, factor to the Earl of Marchmont, to the pannel, for ſhooting upon his lordſhip's ground, bearing date the Thirteenth day of April, One thouſand ſeven hundred fifty-two, being alſo produced; the counſel for the proſecutors repreſented, that they were unac-

unacquainted with the hand-writing of the perſon whoſe ſubſcription it bears; but, to ſave time to the court and jury, they were willing to admit the repreſentation of the counſel for the pannel as evidence, that this licence was really granted of the date it bears.

(Signed) HENRY DUNDAS.

The counſel for the pannel, in anſwer to the quality added to the firſt admiſſion by the counſel for the proſecutor, do ſay, that by the law and practice of this country, every landholder has a right to ſhoot, and to grant licences for ſhooting upon his own ground.

The counſel for the pannel opened, as another matter of evidence in his exculpation, that lord Eglintoun was frequently in uſe to proſecute poachers, but that he never proſecuted the pannel as a poacher, and offered to prove the ſame.

The counſel for the proſecutor anſwered, that, to their knowledge, the pannel never was proſecuted by lord Eglintoun as a poacher, though they believe that lord Eglintoun frequently proſecuted poachers.

(Signed) HENRY DUNDAS.

DAVID STIRRAT, maſon, in Gourack, aged forty-ſix years, married, purged of malice and partial counſel, ſworn, and interrogate, depones, That about fifteen years ago, when the deponent one day was carrying his gun upon the late lord Eglintoun's ground near Saltcoats, he ſaw a gentleman, whom he did not know, riding towards him, whereupon he hid his gun in a buſh. That the gentleman, whom he ſaw afterwards to be the earl of Eglintoun, having come up, knocked the deponent down with his whip; that the deponent having recovered, was aſked where his gun was: whereupon the deponent went to the buſh, took it out, and gave it to the earl, and no more happened; That the deponent was a little ſtupified that day with the blow, but did not feel it after, and that he never got back his gun, and that the gun was worth about twelve ſhillings, as the deponent thinks. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) DAVID STIRRAT.
ALEX. BOSWELL.
JAMES

JAMES CRAWFURD, late tenant in Caldcoats, now in Waſhwalls, aged forty and upwards, married, purged of malice and partial counſel, ſolemnly ſworn, and interrogate, depones, That four years ago the late earl of Eglintoun told him that he had taken a gun from a lad in the Muir.—That the lad had ſtruggled to keep the gun, and that he had given him a ſwitch or two in taking it from him; That the earl delivered this gun to the deponent, and deſired him to reſtore it to the lad's brother, to whom he underſtood it belonged. That the deponent having diſcovered that the gun belonged to John Brown, the brother of Thomas Brown, gave the gun to the ſaid John Brown, in Blacklaw. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) JAMES CRAWFURD.
ALEX. BOSWELL.

THOMAS BROWN, younger brother to John Brown, in Blacklaw, aged twenty-two years, unmarried, purged of malice and partial counſel, ſworn, and interrogate, depones, That about four years ago, when the deponent was going with a gun, within half a mile of his own houſe of Blacklaw—a gentleman, whom the deponent did not know, came up to him, and inſiſted to have his gun. That the deponent ſtruggled to keep it, and the gentleman to take it; and when ſo ſtruggling the gentleman gave him a blow or two with his fiſt upon his head, but not very ſore, and took away the deponent's gun.—That the deponent got his brother, John Brown, to go and endeavour to get back the gun; and his brother returned with it, telling him that he had got it from the immediate preceding witneſs, James Crawfurd; and depones that he never employed Dr. Cumming in Irvine, or any body elſe to cure him, as he had no occaſion. *Cauſa ſcientiæ patet.* And this is truth as he ſhall anſwer to God.

(Signed) THOMAS BROWN.
ALEX. BOSWELL.

The counſel for the pannel in the laſt place propoſed to lay before the jury a printed copy of the firſt draught of the indictment againſt the pannel; wherein they ſay, that ſeveral facts are admitted, which are ſuppreſſed, or differently ſtated, in the indictment now under trial.

To which it was anſwered by the counſel for the proſecutors, That the piece of paper referred to is not the indictment which was ever intended to be ſerved upon the pannel, as is evident from neither witneſſes or jury being ſubjoined to the ſame. It is nothing more but one of four copies of a rough draught of the indictment, thrown off for the purpoſe of being ſubmitted to the counſel for the proſecutor, for their conſideration; and that accordingly it was conſidered by them. It was amended in ſuch a manner as appeared to them moſt agreeable to the information they had received, and moſt calculated to give a fair trial to the pannel. That this is the real ſtate of the fact, which the counſel for the proſecutors have no objection ſhould be admitted in the record; but they do object to your lordſhips againſt any other evidence being adduced relative to this matter, becauſe they conſider the attempt as highly irregular; and which, if tolerated, might be attended with the moſt dangerous conſequences in the conduct of criminal buſineſs in this country, and that confidence which the law countenances, as abſolutely neceſſary betwixt counſel and their employers.

At 12 *o'clock at night of the* 26*th of* February.

The procurators for the pannel thereupon declared they cloſed their proof in exculpation.

Whereupon the evidence on the part of the proſecutors was ſummed up to the jury by Mr. Alexander Lockhart, and on the part of the pannel by Mr. David Rae, advocate.

Betwixt the hours of four and five of the clock of the morning of Tueſday *the* 22*d day of* February.

The lord juſtice-clerk, and lords commiſſioners of juſticiary ordain the aſſize inſtantly to incloſe in this place, and to return their verdict in the ſame place this evening, at ſix o'clock; continue the diet againſt the pannel, and whole other diets of court till that time; ordain the fifteeen aſſizers, and all concerned, then to attend, each under the pains of law, and the pannel in the mean time to be carried back to priſon.

Curia Juſticiaria S. D. N. Regis tenta in nova Seſſionis Domo de Edinburgh vigeſimo ſeptimo die Februarii, milleſimo ſeptingenteſimo & ſeptuageſimo per Honorabiles viros Thomam Miller de Barſkimming dominum juſticiarum clericum, Alexandrum Boſwell de Auchinleck, Henricum Home de Kaimes, Jacobum Ferguſon de Pitfour, Georgium Brown de Coalſton, & Robertum Bruce de Kennett, dominos commiſſionarios juſticiariæ dict. S. D. N. Regis.

Curia legitime Affirmata.

INTRAN. MUNGO CAMPBELL, officer of exciſe at Saltcoats in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel,

Indicted and accuſed as in the preceding Sederunt.

The perſons who paſt upon the aſſize of the ſaid pannel, returned the following verdict.

At Edinburgh, the twenty-ſeventh day of February, one thouſand ſeven hundred and ſeventy years.

THE above aſſize having incloſed, made choice of the ſaid Hugh Dalrymple, of Fordell, to be their chancellor, and William Tytler of Woodhouſlie to be their clerk; and having conſidered the criminal indictment, raiſed and purſued at the inſtance of Archibald earl of Eglintoun, brother-german to the deceaſed Alexander earl of Eglintoun, with concourſe, and alſo at the inſtance of James Montgomery, eſquire, his Majeſty's advocate for his Majeſty's intereſt, againſt Mungo Campbell exciſe officer at Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel; with the interlocutor on the relevancy thereof pronounced by the lord juſtice-clerk

and

and lords commiſſioners of juſticiary, the depoſitions of the witneſſes adduced by the proſecutors for proving their libel, and the declarations of the pannel libelled on, together with the admiſſions made by the procurators for the proſecutors, and the depoſitions of the witneſſes adduced by the pannel for his exculpation, They, by a great plurality of voices, find the pannel, Mungo Campbell, GUILTY. In witneſs whereof their ſaid chancellor and clerk, have ſubſcribed theſe preſents in their names, and by their appointment, place and date foreſaid.

(Signed) HUGH DALRYMPLE, Chanc.
WILLIAM TYTLER, Clerk.

THE lord juſtice-clerk, and lords commiſſioners of juſticiary, having conſidered the verdict of aſſize, dated and returned this twenty-ſeventh day of February, againſt Mungo Campbell officer of exciſe in Saltcoats, in the county of Air, preſent priſoner in the Tolbooth of Edinburgh, pannel; whereby the aſſize by a great plurality of voices, find the ſaid Mungo Campbell, pannel, guilty; They, in reſpect thereof, by the mouth of Edward Hay, dempſter of court, decern and adjudge the ſaid Mungo Campbell to be carried from the bar back to the Tolbooth of Edinburgh, therein to remain, and to be fed upon bread and water only, in terms of the act of parliament paſt in the twenty-fifth year of the reign of his late majeſty king George the ſecond, entitled "An "act for preventing the horrid crime of murder," until Wedneſday the eleventh day of April next to come, and upon that day to be taken forth of the ſaid Tolbooth, and carried to the common place of execution in the Graſs-market of Edinburgh; and then and there, betwixt the hours of two and four o'clock in the afternoon of the ſaid day, to be hanged by the neck by the hands of the common executioner, upon a gibbet, until he be dead; and his body thereafter to be delivered to Doctor Alexander Monro,

professor of anatomy in Edinburgh, to be by him publickly dissected and anatomized, in terms of the said act; and ordain all his moveable goods and gear to be escheat and inbrought to his Majesty's use: which is pronounced for doom.

Signed
THO. MILLER.
ALEX. BOSWELL.
HENRY HOME.
JAMES FERGUSON.
GEO. BROWN.
ROBERT BRUCE.

INFOR-

INFORMATION

FOR

ARCHIBALD Earl of EGLINTOUN,

AND

JAMES MONTGOMERY, Esq.

His Majesty's Advocate, for his Majesty's Interest;

AGAINST

MUNGO CAMPBELL,

Excise-officer at Saltcoats, in the County of Air,

Now PRISONER in the Tolbooth of Edinburgh,

PANNEL.

INFORMATION

FOR

ARCHIBALD DOUGLAS,

AND

JAMES MONTGOMERY, Esq.

AGAINST

MUNGO CAMPBELL,

Procurator-fiscal of Salcoats, in the County of Ayr,

Now PRISONER in the Tolbooth of Edinburgh.

FAMILIE.

JANUARY, 3, 1770.

INFORMATION

FOR

ARCHIBALD Earl of Eglintoun, and JAMES MONTGOMERY, Eſquire, his Majeſty's Advocate, for his Majeſty's Intereſt;

AGAINST

MUNGO CAMPBELL, Exciſe-officer at Saltcoats, in the County of Air, now Priſoner in the Tolbooth of Edinburgh, Pannel.

THE ſaid Mungo Campell ſtands indicted and accuſed of the crime of *Murder*, "In ſo far as the deceaſed Alexander Earl of Eglintoun having, the time libelled, gone out from his houſe of Eglintoun, in the county of Air, in his coach, to look at ſome of his grounds, and being told by one of his ſervants, when upon the road from Saltcoats to Southennan, within the pariſh of Ardroſſan, and ſaid county of Air, that he obſerved two perſons, one of them with a gun, at a ſmall diſtance, upon his lordſhip's ground of Ardroſſan, the ſaid deceaſed earl, who, by an advertiſement in the news papers, had forbid all unqualified perſons to kill game within his eſtate, came out of his coach unarmed, and mounted a horſe, which was led by his ſervant, and leaving in his coach an unloaded gun, he rode towards the two perſons, who in the mean time went off the earl's grounds of Ardroſſan into the adjacent ſands; and he having come near to the two perſons on the ſaid ſands, and diſcovering the one with the gun to be the ſaid Mungo Campbell, he accoſted him, by ſaying, *Mr. Campbell, I did not expect to have found you ſo ſoon upon my grounds, after the promiſe you made me, when I laſt catched you, when you had ſhot a hare.* And the earl having thereupon deſired him to deliver his gun to him, he refuſed ſo to do; and, upon the earl's approaching towards him, he cocked his gun, and preſented, or pointed it at him; and upon the earl's then ſaying, *Sir, will you ſhoot me?* he anſwered, That he would, if his lordſhip did not keep off. To which the earl replied, That if he had his gun, he could ſhoot pretty well too, or uſed words to that import, and deſired a ſervant to bring his gun from his coach, which was then at

ſome diſtance; and the earl having diſmounted, and walked towards him, leading his horſe in his hand, without arms or offenſive weapons of any kind, the pannel retired, or ſtept backwards, as the earl approached, and continued to point his gun at him, deſiring his lordſhip again to keep off, or by God he would ſhoot him; and a ſervant near to the earl, having begged of the pannel for God's ſake to deliver his gun, he again refuſed, ſaying he had a right to carry a gun; to which lord Eglintoun anſwered, that he might have a right to carry a gun, but not upon his eſtate without his liberty. But the pannel ſtill perſiſted in refuſing to deliver his gun, and by ſtriking his foot againſt a ſmall ſtone, having fallen upon his back, when retiring, and keeping his gun pointed at lord Eglintoun, as above deſcribed, the muzzle of the gun came thereby to be altered in the direction from lord Eglintoun, and to be pointed near ſtraight upwards; and lord Eglintoun, who was only diſtant from the pannel two or three yards, having ſtopped or ſtood ſtill upon his falling, the pannel, as ſoon as he could recover himſelf, and reſting upon his arm or elbow, aimed or pointed his gun to the ſaid Alexander earl of Eglintoun, and wickedly and felonioufly fired at him, then ſtanding unarmed, ſmiling at his accidental fall; and by the ſhot he was wounded in the belly, in a dreadful manner, the whole lead ſhot in the gun having been thrown into his bowels; of which wound the ſaid Alexander earl of Eglintoun died that night about twelve o'clock."

The libel further ſets forth, "That the pannel, after perpetrating ſo cruel, wicked, and barbarous a crime, did immediately run to one of lord Eglintoun's ſervants, who had brought his gun from his coach, and who was ſtanding at ſome diſtance, and endeavoured to wreſt the gun from him, but was prevented by the aſſiſtance of another ſervant; and when the two ſervants were engaged with the pannel, defending the gun, and endeavouring to ſecure him, the earl, who was then ſitting on the ground, called to the ſervants to ſecure the man, for he had ſhot him; but not to uſe him ill, or uſed words to that purpoſe and effect; and, upon the pannel's being brought near to lord Eglintoun, he ſaid to him, Campbell, I would not have ſhot you.

"That the pannel, when carrying from the place, where he committed the foreſaid crime, in Saltcoats and Irvine, did acknowledge to ſundry perſons, that he had wilfully and intentionally ſhot the ſaid earl; and that the earl, when within two or three hours of his death, in giving an account to John Muir, ſurgeon in Glaſgow, of what had paſſed betwixt the pannel and him, did, in ſubſtance, ſay, that the pannel did take an aim at him, and ſhot him wilfully. "At

" At leaſt, at the time and place above deſcribed, the ſaid Alexander earl of Eglintoun was felonioufly murdered, or bereaved of his life, by a wound he received from the ſhot of a gun, and of which wound he died in about twelve hours, or ſome ſhort ſpace thereafter; and the pannel was actor, art and part of the ſaid murder." And the libel concludes, " That all this, or part thereof, being proved by the verdict of an aſſize, the pannel ought to be puniſhed with the pains of law."

The pannel having been brought to the bar of the court of juſticiary, and having heard the foreſaid indictment read, he denied the libel, as laid; and, at the ſame time, his counſel ſtated the facts on which they founded his defence to the following purport:

" That the pannel, who is an exciſe-officer, was in uſe to carry a gun along with him, when he went out in queſt of ſmugglers, and that he ſometimes took a ſhot when he met with any *game* upon the lands of certain gentlemen in the neighbourhood, from whom he had that liberty; that about a year ago, he went to the Horſe-Iſland (a noted place for ſmuggling-veſſels) ſituated upon the coaſt, about two miles from Saltcoats; that, in returning from this iſland, he took a road for foot-paſſengers, running through one of lord Eglintoun's parks, and having ſtarted a hare, and having his gun along with him, he killed the hare; that he having been quarrelled by the earl for ſo doing, he promiſed never to offend again; and as he knew that the earl was ſtrict in preſerving the game, and that he frequently held courts for the purpoſe of proſecuting poachers, he was careful not to tranſgreſs; and, accordingly, he even gave away his fiſhing-rod, when he heard that his lordſhip had prohibited fiſhing upon the water of Garnock.

" That the pannel, having a licence to ſhoot on the lands of Montfodd, the property of Dr. Hunter, lying to the north of the lands of Ardroſſan, the property of the earl; and having met with John Brown on the day libelled, they propoſed to take their courſe that way, and went by the common church-road, through the grounds of one Miller, towards Montfodd.

" That, having met with no game, they reſolved to croſs over to ſome riſing grounds, from whence they could have a view of the Horſe-Iſland; from whence they went through the lands of Montfodd, paſſed over a ſandy plain; and, when they came towards the property of lord Eglintoun, in place of turning down by the ſea-ſide, they kept a little higher, through the lands of Ardroſſan, the property of the earl, that they might ſee the iſland; after which they came down, and proceeded towards the ſhore.

" That in their way thither, they perceived a coach at a little diſtance; and a perſon having come up to them on horſeback, whom they diſcovered to be lord Eglintoun.—His lordſhip accoſted the pannel with great paſſion, calling him *Scoundrel* and *Raſcal*; aſked him how he preſumed to ſhoot on his ground, and demanded of him to deliver up his gun. The pannel was amazed; told him, he had not fired a ſhot that day, and had not been on his ground with the intention of killing game. The earl, however, perſiſted; and the pannel proteſted, and ſaid, 'Purſue me at law, but I will not give up my property,' or words to that import. The pannel at the ſame time held forward the gun, *as the firm indication of his purpoſe* not to part with it, and warned his lordſhip not to perſiſt in the demand. The earl, however, puſhed forward, with an intention to ſeize the gun by force. The pannel retired, and the earl diſpatched his ſervant for a gun, ſaying he could ſhoot as well as the pannel. Brown thereupon took fright, and retired towards Saltcoats.

" That the earl's ſervant returned with a gun, and was within two or three yards of his lordſhip, when the pannel having fallen, his gun unfortunately went off, and ſhot the earl, who was very near him.

" That the ſervants did thereupon immediately attack the pannel, beat, and uſed him cruelly: that the pannel, in his own defence, endeavoured to ſeize the earl's gun, but was prevented by ſuperior force."

The above is the ſubſtance of the facts which were ſtated on behalf of the pannel; and from thence it was argued, 1*mo*, That the pannel had no intention to kill the earl: that his death was occaſioned by the gun's having *accidentally* gone off, when the pannel fell; and that, this being the caſe, there was no juſt ground for charging the pannel with the crime of murder: that what happened was no other than homicide, purely caſual, which meriteth no puniſhment.

2*do*. It was pleaded that, ſuppoſing the pannel had ſhot the earl intentionally, yet the ſame was *juſtifiable*; 1ſt, In reſpect it was done upon juſt provocation, which he undeſervedly received from the earl. 2dly, In reſpect that it was neceſſary, in defence of his property. And, 3dly, in defence of his life.

3*tio*, It was pleaded, that, ſuppoſing the pannel to have exceeded the *moderamen inculpatæ tutelæ*, in defending either his property or his life, he ought not to be puniſhed capitally, as for the crime of murder. And,

4*to*, It was maintained, that, as the act did not proceed from premeditated malice and forethought, but was committed on a *ſuddenty*, *ex calore iracundiæ*, an arbitrary puniſhment could only be inflicted.

The court having ordained both parties to give in informations, in obedience thereto, this is offered on behalf of the profecutors.

And as to the firſt defence, viz. that the homicide in this caſe was merely *caſual*, the gun having accidentally gone off, upon the pannel's falling to the ground, the purſuers ſhall not diſpute, that the ſame, if proved, will be ſufficient to elide the libel, in ſo far as it concludes for a capital puniſhment, or the pains of law; but as an *intention* to kill muſt be *preſumed*, where one perſon kills another with a lethal weapon, eſpecially in the preſent caſe, where it appears from the facts as ſtated for the pannel, that he declared a fixed and determined reſolution to kill, if the earl did not keep off, it will require a very ſtrong and pointed proof to gain belief, that the ſhot immediately following theſe threats was merely accidental; and however this defence, if proved, might be ſufficient to exempt the pannel from the pains of death, yet, as he was at any rate groſly culpable in having a loaded gun confeſſedly placed in ſuch a poſition, that if it ſhould accidentally go off, it could not fail to kill, the pannel would unqueſtionably be liable to a very high arbitrary puniſhment.

The ſecond defence inſiſted upon for the pannel was, that, ſuppoſing him to have intentionally killed the earl, yet, as he had received high provocation, the ſame was *juſtifiable*, at leaſt, that it ought to be available to free him, *a pœna ordinaria*; and this provocation he was pleaſed to qualify in the following manner, viz. that the earl accoſted him with great paſſion, calling him ſcoundrel and raſcal, and accuſing him of a breach of promiſe; whereas, from the time he had made that promiſe, he had never been upon the earl's ground with an intention of killing game.

This averment of the earl's having accoſted the pannel with inſulting language and opprobrious names, is what the purſuers do poſitively deny; the indictment ſets forth very particularly the whole converſation which paſſed between the earl and the pannel on that occaſion, and the purſuers are confident no more will come out on proof; but allowing, for argument's ſake, that the earl had expreſſed himſelf in the words that are here alledged, there is no relevancy in the defence, and it is founded neither in law nor in ſound reaſon; and indeed, if ſuch a defence was to be admitted, it would deſtroy the chief purpoſe and intendment of the law, in inflicting the pains of death upon this cruel and unnatural crime.

Murder is a crime of ſo horrid an aſpect, and ſo ſhocking to human nature, that even the moſt depraved part of mankind, when in cool blood, will ſtartle at the thoughts of

committing it. It very rarely happens, that a man goes cooly and deliberately to work in murdering one of his fellow-creatures. Solon, a great and wiſe legiſlator, thought the crime of parricide ſo unnatural, that he conſidered it as an affront to human nature to ſuppoſe that mankind could be guilty of it, and therefore made no poſitive law againſt the commiſſion of it; and, for the ſame reaſon, if the puniſhment of murder was only to be confined to caſes where it is cooly and deliberately perpetrated, the ſafety of ſociety would ſcarce require a poſitive law againſt the commiſſion of it; ſo that the great object of the law was truly to curb the paſſions of mankind, and to prevent them from deſtroying one another, when rouſed and heated, whether by provocation, real or imaginary. It is the duty of mankind, who are endowed with rational faculties, to curb and ſubdue their paſſions, and to keep them within proper bounds; and as laws were made and became neceſſary, chiefly on account of the depravity of mankind, theſe paſſions cannot afford a ſufficient excuſe againſt the ordinary puniſhment of an atrocious crime. The ſafety and good of ſociety require, that the ordinary puniſhment ſhould be inflicted, that mankind may be cautious, and even when provoked, may keep a ſtrict guard over their actions, and curb and confine their paſſions within proper bounds.

It would therefore be highly inexpedient for the peace and ſafety of mankind, to hold it as any excuſe for the commiſſion of an atrocious crime, that the ſame was done when in the heat of paſſion or anger, upon provocation received; for, beſides, that there is no proportion betwixt the life of a man, and any verbal injury that poſſibly can be given, it is a rule founded in the very being and exiſtence of ſociety, that no man is at liberty to avenge his own wrongs; and, as a verbal injury already received, cannot be recalled, by killing the perſon who gave the injury; ſo the making it lawful, either to kill, or otherwiſe to puniſh the perſon who gave the injury, would be truly allowing mankind to reſent and avenge their own wrongs, which the laws of no civilized ſtate will ever permit, as it muſt neceſſarily tend to the diſſolution of ſociety, and of all good order and government.

Accordingly, it is an opinion, univerſally received among lawyers, that no verbal injury, which is all that is alledged in this particular defence, is ſufficient to excuſe *a pœna ordinaria*, in the puniſhment of the crime of murder.

This very queſtion is ſtated by Voet, (lib. 48. tit. 8. § 9.) and reſolved in the following words: "Proinde, ſi quis injuria quadam verbali provocatus, uſque adeo iræ indulgendum cenſuerit, ut ſtricto cultro, gladiove injuriantem occidat, vix

eſt,

eſt, ut ab ordinaria pœna abſolvendus ſit, cum multum interſit inter verbales injurias et atrociores reales, quarum hæ ſi præceſſerint, mitigationem pœnæ ſuadere poſſunt; illæ non item, quippe tam leves habitæ, ut recantatione, deprecatione, ſimilibuſque modis ſecundum tradita, in *tit. de injuriis*, evaneſcant."

Sir George Mackenzie (tit. Murder, § 3.) is alſo clearly of this opinion, which he delivers in the following paſſage: "It is alſo controverted amongſt lawyers, if, ſeeing honour is as dear as life, it be lawful to kill him who aſperſes our honour, as it is lawful to kill him who aſſaults our life; and, albeit Farinacius be of the judgment, that he who is thus provoked, being a perſon of far more eminent condition than the injurer, killing him is not to be puniſhed as a murderer, *ſed pœna extraordinaria, licet injuria ſit verbalis:* yet, in my judgment, he errs in that poſition; for, in effect, that is not ſelf-defence, (becauſe the verbal injury cannot be retreated nor retained) but it is *revenge*; yet *dolor juſtus aliquando operatur, ut pœna ordinaria temperetur.* But yet that is not allowed in killing, and ſuch other injuries, which *non poſſunt revocari.*"

Matthæus in mentioning the caſes where the ordinary puniſhment ought not to be inflicted, makes no mention of verbal injuries, but confines it to thoſe real injuries in which human nature cannot be ſuppoſed to overcome the juſt reſentment naturally ariſing againſt the committers of them: "Eo amplius, et ſi dolo malo homo cæſus ſit, tamen interdum pœna gladii remittitur; nam qui impetu occidunt, et ſi dolo non carent, tamen ſi juſtus dolor impetum concitaverat mitius puniuntur. Ita reſponſum de marito qui occidit uxorem adulteram, &c." Tit. de Sicariis, cap. 3. ſect. 4.

And although the law of England has, in certain caſes, been leſs ſevere in the puniſhment of homicide, than the law of Scotland, and has accordingly eſtabliſhed a diſtinction betwixt murder and manſlaughter, yet it is there laid down as a general rule, that a verbal injury is in no caſe ſufficient to acquit from the ordinary puniſhment of murder; eſpecially if the ſame was committed by a lethal weapon.

This doctrine is clearly laid down in a book of great authority in the law of England, viz. a Treatiſe upon certain Branches of the Crown Law, by Mr. Juſtice Foſter. In treating of *homicide*, cap. 5. ſect. 1. he ſays, "That words of reproach, how grievous ſoever, are not a provocation ſufficient to free the party killing from the guilt of murder; nor are indecent provoking actions or geſtures, expreſſive of contempt or reproach, without an aſſault upon the perſon.

This

" This rule will, I conceive, govern every caſe where the party killing upon ſuch provocation, maketh uſe of a deadly weapon, or otherwiſe manifeſteth an intention to kill, or to do ſome great bodily harm; but if he had given the other a box on the ear, or had ſtruck him with a ſtick or other weapon, not likely to kill, and had unluckily, and againſt his intention, killed, it had been but manſlaughter."

" The difference between the caſes is plainly this: in the former the *malitia*, the wicked, vindictive diſpoſition already mentioned, evidently appeareth; in the latter, it is as evidently wanting. The party, in the firſt tranſport of his paſſion, intended to chaſtiſe for a piece of inſolence, which few ſpirits can bear; in this caſe, the benignity of the law interpoſeth in favour of human frailty; in the other, its juſtice regardeth and puniſheth the apparent malignity of the heart.

" And it ought to be remembered, that in all other caſes of homicide, upon ſlight provocation, if it may be reaſonably collected from the weapon made uſe of, or from any other circumſtance, that the party intended to kill, or to do ſome great bodily harm, ſuch homicide will be *murder*. The miſchief done is irreparable, and the outrage is conſidered as flowing rather from brutal rage, or diabolical malignity, than from human frailty; and it is to human frailty, and to that alone, the law indulgeth in every caſe of felonious homicide."

The very ſame doctrine is laid down by Mr. Blackſtone, in his Commentary upon the Law of England, vol. IV. fol. 200. " If a man kills another ſuddenly, without any, or without a conſiderable provocation, the law implies malice; for no perſon, unleſs of an abandoned heart, would be guilty of ſuch an act, upon a ſlight, or no apparent cauſe. *No affront, by words or geſtures only, is a ſufficient provocation, ſo as to excuſe or extenuate ſuch acts of violence, as manifeſtly endanger the life of another.* But if the perſon ſo provoked, had unfortunately killed the other, by beating him in ſuch a manner, as ſhewed only an intent to chaſtiſe, and not to kill him, the law ſo far conſiders the provocation of contumelious behaviour, as to adjudge it only manſlaughter, and not murder."

The ſame doctrine is laid down by Hawkins, tit. Murder, § 33.

Both the law and the reaſon of it, are elegantly and diſtinctly pointed out by theſe authors. The law hath ſo far made an allowance for the frailty of human nature, that where a perſon has received a verbal injury, he may retort it; and it will even afford an alleviation of the offence, ſuppoſing he ſhould proceed to a moderate chaſtiſement; but as there

there is no ſort of proportion betwixt a verbal injury and the life of a man, which, when taken away, can never be reſtored, ſo, where a perſon proceeds in reſentment of ſuch injury, to imbrue his hands in the blood of any of his fellow-creatures, the law has moſt juſtly conſidered, that an action ſo wicked and barbarous can only proceed from ſuch a malignity of heart and depravity of diſpoſition, as muſt render him a very unfit member of ſociety, and a proper object of that vengeance which the law has moſt juſtly inflicted upon the ſhedding of innocent blood.

But it will be neceſſary to inſiſt farther upon this point, as it appears from the facts, as ſtated by the pannel himſelf, that it was not in a heat of paſſion, and in reſentment of any provocation the pannel is ſuppoſed to have received, that the earl was killed. The abuſive language which the earl is ſuppoſed to have given on the occaſion, is ſaid to have happened upon the earl's firſt accoſting the pannel; ſo that, if it had been done in the heat of paſſion, on account of the provocation received, it muſt naturally have happened when the abuſe was given; whereas it appears, from the pannel's own ſhowing, that he was not overcome with paſſion upon the occaſion; that he continued perfectly maſter of himſelf; that he accordingly retired for ſome time, and that upon the earl's approaching near to him, the pannel killed him, in proſecution of a fixed and determined purpoſe and reſolution.

And this leads the purſuers to conſider what was in the next place offered on behalf of the pannel, viz. that it was lawful for him to kill the earl in defence of his property.

Upon this point, it was ſaid for the pannel, that he had not been trepaſſing upon the earl's property; that he was not upon his grounds when the earl attempted to ſeize his gun; that he had not been upon them that day with an intention to kill game; and that, although he had, yet the law gave the earl no power to ſeize his gun *brevi manu*, or to inflict any other puniſhment upon him for the ſuppoſed treſpaſs; that the earl ought to have had recourſe to a court of juſtice for inflicting the penalties of the law for the ſuppoſed offence; and that this point had been ſo determined by the court of ſeſſion, upon the 23d of January, 1753, in the caſe of Mr. David Gregory, profeſſor of mathematicks in the univerſity of St. Andrew's, againſt Walter Wemyſs of Lawthocker; and from the premiſes the following concluſion was drawn, that as it was unlawful for the earl to ſeize the pannel's gun, the pannel was intitled to defend his property againſt ſuch unlawful attack, even at the expence of the life of the invader; and this ought the more eſpecially to afford the pannel a good defence in the preſent caſe, that he having been a ſoldier, he could

could not, conſiſtently with his *honour*, ſurrender his gun to any perſon whatever.

Whether the pannel's conduct, on this occaſion, was conſiſtent with the laws of honour, ſhall be afterwards conſidered; that it was highly inconſiſtent with the doctrines and precepts of Chriſtianity, cannot be diſputed. It is therein laid down, that "if any man will ſue thee at the law, and take away thy coat, let him have thy cloak alſo; and whoſoever ſhall compel thee to go a mile, go with him twain." Matth. v. 40, 41. The great Author of our religion did thereby mean to teach mankind, that it was more becoming the dignity of human nature to forgive injuries than to reſent them, and to inculcate upon them the ſuitableneſs of a ſpirit of meekneſs and moderation, as moſt conducive not only to the private happineſs of individuals, but to the peace, quiet, and good of ſociety; and that injuries, which in their nature are trifling and inconſiderable, ought much rather to be ſubmitted to, than to be made the ground of quarrel and diſpute; and it muſt ſurely, at firſt ſight, appear very inconſiſtent with the aforeſaid doctrine, for any man to maintain, that rather than part with the poſſeſſion of a trifling property (which, if unjuſtly taken from him, could eaſily be recovered) he ſhould think himſelf at liberty to take away the life of one of his fellow-ſubjects.

Indeed, without having recourſe to any poſitive law, either divine or human, the purſuers may appeal to the common feelings of mankind, for a determination of the preſent queſtion. There is no man who is poſſeſſed of any ſpark of humanity, or of any notions of right or wrong, who muſt not at once declare that he would much rather ſurrender a property, ten times the value of that which was the ſubject of conteſt in this caſe, than ſhed the blood of the meaneſt, or of the moſt abject of the human ſpecies.

As to the pannel's honour, which was much inſiſted upon in this caſe, it is, with ſubmiſſion, rather too ludicrous to ſay, that a man whoſe former rank in life was none other than that of a common ſoldier, and who at preſent is an inferior officer of exciſe, was in honour called upon rather to take away the life of one of his fellow-creatures, than to yield the poſſeſſion of his gun, which he could eaſily again have recovered, if it was unjuſtly taken from him. Indeed this plea of honour, which is not a *nomen juris*, is a very improper topick to be urged before your lordſhips as a court of law and of juſtice. Your lordſhips are not here to judge according to the falſe notions and punctilios of honour that are commonly entertained amongſt a certain ſet of men; but whether in law and in juſtice, the pannel was intitled to maintain

tain the poſſeſſion of his gun at the expence of the life of one of his majeſty's ſubjects.

At the ſame time, the purſuers will be pardoned to think, that if the pannel was to be tried by a court of honour, properly ſo called, he would likeways be condemned, and that it would be found, that he had not only acted a moſt illegal, barbarous, and inhuman part, but had behaved moſt *diſhonourably*. The earl accoſted him defenceleſs and unarmed. If the pannel had conſidered his honour as injuriouſly attacked by the demand which the earl made to deliver up his gun, he ought either to have laid aſide his gun, and to have engaged with the earl upon equal terms, or he ought to have challenged him to ſingle combat, and have waited till the earl was properly armed for that purpoſe. But when, in place of following that courſe, (which might have been expected from one who pleads the point of honour) he pours a loaded muſquet into the bowels of a man unarmed and totally defenceleſs; the action muſt be condemned, not only as barbarous and cruel, but as moſt diſhonourable, by every man who poſſeſſes the ſmalleſt ſpark of honour in his breaſt. Honour, therefore, cannot avail the pannel in this caſe. The point of honour is much againſt him. And therefore the purſuers ſhall leave that topick, and conſider the queſtion in this ſimple view, Whether the pannel was intitled to maintain the poſſeſſion of his gun at the expence of the earl's life, ſuppoſing it to be true, but which was by no means the caſe, that the earl had either aſſaulted the pannel, with an intention to bereave him of his gun, or had uſed any threatening expreſſions, ſignifying his determined reſolution ſo to do.

And, in the *firſt place*, the purſuers beg leave to diſpute the point of law that was maintained upon the other ſide, *viz.* That the earl had not a right to ſeize the pannel's gun. By act 13 parl. 1707, it is expreſly enacted, "That no common fowler ſhall preſume to hunt on any grounds, without a ſubſcribed warrant from the proprietors of the ſaid grounds, under the penalty foreſaid, beſides forfeiting their dogs, guns, and nets, to the *apprehenders* or diſcoverers."

It is humbly ſubmitted to your lordſhips, if it is not implied in the very words of this ſtatute, which forfeits the dogs, guns, and nets to the *apprehenders*, that it is lawful to ſeize the dogs, guns, and nets, *brevi manu*, from the perſon found in the tranſgreſſion. This, with ſubmiſſion, is the only ſenſe and conſtruction which can be put upon the word *apprehenders* in the foreſaid ſtatute; and as this is the natural conſtruction of the words, ſo it ſeems to be agreeable to the true ſpirit and intendment of the ſtatute, *viz.* by the immediate ſeizure of theſe inſtruments of deſtruction in the poſſeſ-

ſion of ſuch unqualified perſons found *in reatu*, to prevent their being again uſed to the ſame unlawful purpoſes, or their being ſecreted and otherways diſpoſed of, if allowed to remain in their poſſeſſion, whereby the after-diſcovery of them might be attended with difficulty: and therefore it would appear that the legiſlature, from a ſenſe of theſe inconveniencies, had, by the foreſaid ſtatute, introduced this more ſummary and effectual remedy, in permitting the dogs, guns, and nets to be *brevi manu* apprehended, in order to lay the foundation for an after-conviction in a court of juſtice.

Neither is this any thing new in the law; all the ſtatutes made againſt ſmuggling, authoriſe the officers of the revenue to begin with ſeizing the goods, leaving it to be afterwards tried by the proper court, whether they have been juſtly ſeized or not, and whether they ſhould be carried into condemnation, or reſtored to the proper owner.

And as to the deciſion, Gregory contra Wemyſs, it is, in the firſt place, a ſingle deciſion; and when the queſtion does again occur, it would well merit to be reconſidered, eſpecially as the ſtatute has been univerſally underſtood in the ſenſe now contended for by the purſuers. It has from time immemorial been a general practice over the whole kingdom, to ſeize dogs, guns, and nets, without any previous conviction; and until the foreſaid caſe in the year 1753, no action of damages or reſtitution had ever been brought, on account of ſuch ſeizures.

But, 2*dly*, The deciſion, in the caſe of Gregory, as it ſtands reported, does not appear to eſtabliſh the general point. Baird, from whom the gun was ſeized, was not proprietor of the gun: it belonged to Mr. Gregory, who was accompanied by Baird; and it does not appear from the deciſion, that Mr. Gregory was not intitled to kill game.

It is of no moment, that the pannel was not upon the earl's ground, but upon the ſea-ſhore, when his gun was demanded; he had been upon the earl's property immediately before, under the earl's own obſervation; and as it muſt be preſumed, that he was there with an intention of killing game, if he had found any, the earl had the ſame right to ſeize his gun, as if he had got up with him before he left the earl's grounds, by ſtepping in upon the adjacent ſands.

The purſuers, at the ſame time, apprehend, that it is very immaterial in the preſent queſtion, whether the earl, in ſtrict law, had a title, *brevi manu*, to ſeize his gun or not. Was the queſtion here ſimilar to that in Mr. Gregory's caſe, about reſtitution of the gun, as unlawfully ſeized, the queſtion in law, How far the ſeizure was legal or not, would fall properly to be conſidered and determined; but, for the preſent

pur-

purpoſe, it is ſufficient to ſay, that it was univerſally underſtood, that the guns of perſons, who have neither title nor licence to hunt upon the grounds of another, might be ſeized, *brevi manu*, and that, in fact, ſuch ſeizures were generally made without any complaint.

This is ſufficient to ſhow, *quo animo*, the earl required of the pannel to deliver his gun. The pannel could not but know, that the earl did not intend to commit a robbery, by violently and *felonioufly* carrying off the property of another, to which he had no manner of right, but that he acted only under the common apprehenſion, that every heritor had a right to ſeize dogs, guns, and nets, from unqualified perſons hunting upon their property, without any licence. It is plain, that the earl, if he had, *de facto*, ſeized and carried off the gun, could not have been tried as guilty of felony, even upon the ſuppoſition that, in ſtrict law, he was not authoriſed to make the ſeizure; the fartheſt it could have gone, would be only to found the pannel in a civil action for reſtitution, or perhaps for damages; and, when that is the caſe, it is, with ſubmiſſion, clear, that the pannel, in defending his property againſt that treſpaſs, was not intitled to take away the life of the ſuppoſed treſpaſſer.

It was indeed maintained on behalf of the pannel, that a man was intitled to defend his property to the laſt, even at the expence of the life of the invader; and ſundry authorities were appealed to, in ſupport of this general propoſition, particularly, Grotius *De jure belli et pacis*, lib. 2. cap. 1. § 11, Puffendorf *De jure naturæ et gentium*, Carpzovius, and others; but when theſe authorities are attended to, none of them can avail the pannel. Theſe authorities do only apply to the caſe where one's property is *felonioufly* invaded; and when it cannot be otherwiſe ſecured than by taking away the life of the invader; which will never apply to the preſent caſe, where the attack made upon the pannel was not with a felonious intention, but where his property was abſolutely ſecure, and could eaſily have been recovered, if the earl had not a juſt title both to ſeize and to hold it.

And it was a poor reply that was made on the other ſide, *viz.* that the pannel was not obliged to ſubmit to the expence of a law-ſuit, in order to recover his property; becauſe, if it ſhould be found that the earl was in the wrong, his gun not only would have been reſtored to him, but the court would have fully indemnified him of the whole damages and expences he could qualify he had ſuſtained, by the illegal ſeizure and detention of his gun.

The pannel's counſel did likewiſe appeal to *l.* 3. § 9. *ff. De vi et vi armata*; and alſo to *l.* 1. *Cod. unde vi*; but with

what propriety, the purſuers are at a loſs to diſcover. The firſt of theſe proves no more than this, That, where one is invaded with arms, it is lawful for him to defend himſelf by arms: and, as to the other text, it proves no more than this, That a man is entitled to defend his poſſeſſion *moderatione inculpatæ tutelæ*, without defining the bounds or limits thereof; and the ſame anſwer does occur to the paſſage from lord Stair, fol. 174, and from the late Inſtitute, vol. i. fol. 512, § 31. No more is there ſaid, than that one may continue or recover his poſſeſſion by force *ex incontinenti*; but theſe learned authors have no where ſaid, that it is lawful for the perſon in poſſeſſion to kill the perſon who endeavours to eject him; far leſs could it be maintained, that a perſon was juſtifiable for killing, under the circumſtances of the preſent caſe, where the perſon in poſſeſſion did not run the ſmalleſt riſk of loſing his property, if he was entitled to hold it; and where the perſon who is ſuppoſed to have attempted the ſeizure, was totally defenceleſs and unarmed, and ſo could not be ſuppoſed to intend violence of any kind.

If the earl had no title to demand the pannel's gun, he might, no doubt, refuſe to deliver it up; and if the earl had thereupon attempted to take it from him by force, he might, perhaps, have been juſtifiable in ſtruggling to maintain his poſſeſſion. But it is repugnant to reaſon, and the common feelings of mankind, to ſay, that, under the circumſtances of the caſe, the pannel was at liberty to bereave the earl of his life, rather than part with his gun.

The purſuers humbly apprehend, that, in ſound law, and in reaſon, no man is intitled to kill, in defence of his property, unleſs where he is attacked with a felonious intention to rob and bereave him of his property; but where the perſon who makes the attack has clearly no felonious intention, but only, under an erroneous apprehenſion of his own right, commits a treſpaſs upon the property of his neighbour, and for which redreſs can eaſily be had in a court of law, in ſo far as the party has been injured; the law of no civilized country will, in theſe circumſtances, allow a perſon to kill another, under the pretence of defending his property.

The contrary doctrine would lead to ſtrange and abſurd conſequences. If killing was juſtifiable in ſuch a caſe as the preſent, a perſon might be equally juſtified for killing for every treſpaſs that was made upon his property. If it was lawful for the pannel to kill the earl, in order to prevent him from ſeizing his gun, notwithſtanding he believed he had a right to ſeize it, by the ſame rule the earl might have been juſtified for killing the pannel, in attempting to come upon the earl's lands againſt his will.

Your lordſhips know that, by the ſtatute 1686, it is lawful for every proprietor or poſſeſſor of lands, *brevi manu*, to poind the cattle found upon his grounds, and detain them, until he be paid half a merk for each beaſt found in the ſkaith. Now, let it be ſuppoſed, that the heritor, in attempting to ſeize and poind, ſhould be reſiſted by the proprietor of the cattle; and that the proprietor of the grounds, from his not being preciſely acquainted with the marches, ſhould attempt to poind ſome of theſe cattle which were, *de facto*, not upon his property, but upon the other ſide of the march; is it poſſible to maintain, that the proprietor of the cattle, in order to prevent his property from being unjuſtly carried off from him, would be juſtified in killing the perſon making the ſeizure? It is believed, that no man would heſitate a moment in declaring the proprietor of the cattle guilty of murder, when it was plain, that the proprietor of the lands had no felonious intention to bereave him of his property; but had only been led to commit the treſpaſs, upon an erroneous apprehenſion of his own right; and when, at the ſame time, the cattle could be recovered by an action at law, with full damage and expences of proceſs.

It is founded in the very nature of ſociety and government, that no man is intitled to avenge his own wrongs, or take juſtice at his own hand, unleſs where the laws of the ſociety cannot give him relief. In this view, it may be lawful to defend himſelf againſt an irreparable loſs, even at the expence of the life of the aggreſſor. A woman, for example, may be juſtified for killing the perſon who makes an attack upon her chaſtity, when ſhe cannot otherwiſe prevent the violation of it; and, in like manner, it may be lawful, in defence of one's property, to kill a robber who felonioſly endeavours to bereave him of it; becauſe, without ſo doing, his property may be loſt. When the robber has once carried off the goods, it may not be in the power of the law to give the perſon injured any relief; but that will never apply to the caſe in hand, and the other caſes above-mentioned, where there was clearly no felonious intention, and where the party ſuppoſed to be injured ran no riſk of loſing his property, which remained perfectly ſecure; and where, if he was in the right, the public law of the land would give him full indemnification and relief.

The above diſtinction is clearly pointed out by numbers of authorities. Puffendorf, in his treatiſe *De jure naturæ et gentium*, lib. ii. cap. 5. §4. after ſtating the rights competent to mankind in a ſtate of nature, proceeds as follows: "Aſt vero quod licet in naturali libertate viventibus, qui ſuam ſalutem propriis viribus proprioque ex judicio expediunt; id haud quaquam indulgetur illis, qui in civitatibus degunt, et quidem imprimis adverſus ſuos cives. Hi enim violentam ſui

defenſionem adverſus cives perpetuos aut temporarios ita moderari tenentur, ut eam tunc demum adhibeant, quando tempus ac locus non ſerunt auxilium magiſtratus ad repellendam eam injuriam implorari, *qua vita vitæque æquipollens, aut irreparabile damnum in præſentaneum periculum conjicitur.* Et quidem, ut periculum tantummodo depellatur; vindicta autem et cautio de non offendendo in poſterum magiſtratus arbitrio relinquatur."

The diſtinction already ſtated, is likewiſe pointed out by Mr. Juſtice Foſter, who, in the treatiſe already mentioned, *on homicide*, cap. iii. lays it down, that "in the caſe of juſtifiable ſelf-defence, the injured party may repel force with force, in defence of his perſon, habitation, or property, againſt one who manifeſtly intendeth and endeavoureth, with violence or ſurprize, *to commit a known felony upon either.* In theſe caſes he is not obliged to retreat, but may purſue his adverſary, till he findeth himſelf out of danger; and if in a conflict between them he happeneth to kill, ſuch killing is juſtifiable."

And in the ſame chapter, he ſays, "Where a *known felony* is attempted upon the perſon, be it to rob or murder, here the party aſſaulted may repel force with force, and even his ſervant then attendant on him, or any other perſon preſent, may interpoſe for preventing miſchief; and if death enſueth, the party ſo interpoſing will be juſtified. In this caſe, nature and ſocial duty co-operate."

And in cap. v. § 4. he ſays, that, "no man under the protection of the law is to be the avenger of his own wrongs. If they are of ſuch a nature for which the laws of ſociety will give him an adequate remedy, thither he ought to reſort."

The diſtinction which the purſuers have endeavoured to eſtabliſh, is clearly pointed out by this learned judge. He, in ſtating, in what caſes it is juſtifiable to kill in defence of life and property, confines it to the caſe where a *known felony* is attempted upon either, by robbery or murder; but where the attack made upon property is of ſuch a nature that the law can give an adequate remedy, the perſon attacked is not entitled to avenge his own wrongs, but he muſt reſort to the courts of law for redreſs.

The very ſame doctrine is laid down by Blackſtone, *lib. iv. cap.* 14. § 3. "If any perſon attempts a robbery or murder of another, or attempts to break open a houſe in the night-time, which extends alſo to an attempt to burn, and ſhall be killed in ſuch attempt, the ſlayer ſhall be acquitted and diſcharged. This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking of any houſe in the day-time, unleſs it carries with it an attempt of robbery alſo."

And

And Hawkins in his Treat. of the Pleas of the Crown, (lib. i. cap. 31. § 33.) has the following paſſage: "Alſo it ſeems to be agreed, that no breach of a man's word on promiſe, *no treſpaſs either to lands or goods*, no affront by bare words or geſtures, however falſe or malicious it may be, and aggravated with the moſt provoking circumſtances, will excuſe him being guilty of murder—who is ſo far tranſported thereby, as immediately to attack the perſon who offends him, in ſuch a manner as manifeſtly endangers his life, without giving him time to put himſelf upon his guard; if he kills in purſuance of ſuch aſſault, whether the perſon ſlain did at all fight in his defence or not; for *ſo baſe and cruel a revenge*, cannot have too ſevere a conſtruction."

From the above authorities, it is extremely plain (what indeed is ſtrongly founded in the principles of right reaſon) that no man is at liberty to take away the life of any of his fellow-creatures, in the defence of his goods and property, except where the attack is made upon them with a felonious intention; or, in other words, where the invader, by carrying off the goods, would himſelf have been guilty of felony; but that, where no more than a treſpaſs is committed, and where the party injured can have full and ample reparation by having recourſe to the courts of juſtice, the perſon killing the invader in ſuch circumſtances, is guilty of the crime of murder, and will be juſtly ſubjected to a capital puniſhment.

And indeed ſo anxious have the laws of every well-governed ſtate been to prevent mankind, in a ſtate of ſociety, from conſtituting themſelves the judges and avengers of their own wrongs, that they are not permitted to kill any of their fellow-creatures in defence of their property, even where the ſame is invaded with a felonious intention, except where the ſame becomes abſolutely neceſſary, and the laws of the ſociety unavailable to give them proper reparation and redreſs.

This diſtinction is very clearly laid down in the divine law, which was delivered by Moſes to the Iſraelites, Exod. chap. 22. v. 2 and 3. "If a thief be found breaking up, and be ſmitten, that he die, there ſhall no blood be ſhed for him. *If the ſun be riſen upon him*, there ſhall be blood ſhed for him, for he ſhould make full reſtitution; if he have nothing, then he ſhall be ſold for his theft."

The ſame rule is laid down in the civil law, and, particularly in *l.* 9. *ff. ad leg. Cor. de ſicariis*: "Furem *nocturnum* ſi quis occiderit, ita demum impune feret, ſi parcere ei ſine periculo ſuo non potuit." The general rule among the Romans was, that a thief might be ſlain by night with impunity, but that he could only be lawfully killed by day, *ſi ſe*

tele defenderit. And this doctrine is laid down at great length by Julius Clarus, lib. 5. § Homicidium, No. 47; and alſo by Damhouderius, cap. 78. No. 1, 2, 3, and many others, unneceſſary to mention particularly.

A diſtinction was attempted to be made between avenging a wrong already committed, and preventing the commiſſion of a wrong. The firſt was admitted to be unlawful, but the contrary was maintained as to the other.—But, with ſubmiſſion, the above authorities ſhow clearly, that there is no foundation for any ſuch diſtinction, in ſo far as applicable to the preſent caſe; for, when a man exceeds the bounds of law and of reaſon, in defending againſt a ſuppoſed injury, he avenges his own wrong, and, conſequently, falls under the rules already laid down; and this muſt the rather obtain, in the preſent caſe, where the ſuppoſed injury had no real exiſtence, but in the pannel's own imagination of what the earl might poſſibly intend upon the pannel's refuſing to deliver his gun.

From what has been ſaid, it may be juſtly concluded, that the pannel cannot juſtify himſelf from the murder, with which he is charged, by alledging, that it was neceſſarily committed in defence of his property. It has been ſhown, from various authorities, and from the reaſon of the thing, that killing in defence of property, cannot be juſtified, unleſs where the ſame was felonioufly invaded, and when, at the ſame time, his property could not be otherwiſe ſecured. Whereas, in the preſent caſe, it is plain, that the deceaſed earl had no ſuch intention. He could not have been charged as being guilty of felony, if, *de facto*, he had ſeized and carried off the pannel's gun. He did not thereby intend felonioufly to rob and bereave the pannel of his property. He was led to make the demand, under the belief and apprehenſion, that the law intitled him to make the ſeizure. Whether he was right or wrong in that apprehenſion, is to the preſent iſſue very immaterial. If he was miſtaken, all that could be charged againſt him, if he had carried off the gun, was a common treſpaſs, upon which he might have been ſubjected in a civil action, to reſtore the gun, and to indemnify the pannel of what expences he ſhould incur in making his claim effectual, and what damages he could qualify he had ſuſtained by the ſeizure or detention. It is plain, that if the gun had been taken from him, he ran no riſk of loſing his property. If he had a juſt title to reclaim it, the law was open, where he would get full redreſs; ſo that it is impoſſible, that, with any ſhow of reaſon or juſtice, it can be maintained, that the putting the earl to death, was neceſſary, in defence of his property.

And,

And, as this part of the pannel's defence muſt unqueſtionably be repelled, as utterly irrelevant, the other part of the defence, viz. that the act was committed in the neceſſary defence of the pannel's life, muſt ſhare the ſame fate. The relevancy of this defence the purſuers do not diſpute, but it is utterly inconſiſtent with the facts, as ſtated for the pannel himſelf. It from thence appears, that no violence or injury of any kind was offered or threatened to the pannel's perſon. On the contrary, although the earl had a gun along with him in the coach, he left it there unloaded, comes out and advances to the pannel, altogether unarmed and defenceleſs, and aſks of him to deliver up his gun.

Nor is it a circumſtance of any moment, that the earl at laſt called for his gun, becauſe it is evident, from the whole circumſtances of the caſe, even as told by the pannel himſelf, that the pannel had no reaſon to apprehend, that the earl thereby meant to commit any act of violence upon the pannel's perſon, whatever intention there may have been to deter and overawe the pannel from putting his threats in execution, it is merely impoſſible, that the pannel could be *conſtitutus in periculo vitæ*, as the earl ſtill continued unarmed and defenceleſs at the time he received the fatal wound; and, at any rate, had the earl been in poſſeſſion of his gun at the time, and that the pannel had ſeriouſly believed, that the earl therewith intended him harm, he knew well that he could at any time have ſaved himſelf, by delivering up his gun, and which has been already ſhown, he was not intitled to with-hold, at the expence of the earl's life; his own declaration referred to the indictment, will ſhow, that this is a *mere color quæſitus*; for that the pannel neither was in any danger of his life, nor did apprehend himſelf to be in any ſuch; all that he pretends to have apprehended was, that the earl might intend to take his gun from him.

It was ſaid for the pannel, that he and the earl were upon very unequal terms; for that he had been deſerted by his companion, and left ſingle, whereas the earl was attended with a numerous train of ſervants.

But this circumſtance is, with ſubmiſſion, the worſt apology which the pannel could have offered for his conduct. If he was truly apprehenſive, that bodily harm was intended againſt him, his only ſafety lay in keeping up his fire,—when the gun was diſcharged, he became defenceleſs, and could eaſily be overpowered by ſuch ſuperior numbers; and therefore his unloading his gun in the earl's bowels, affords of itſelf ſufficient proof, that it was not done from any apprehenſion of danger to his own perſon, but that it truly proceeded from the wicked ſcheme, which, from the beginning,

he appears to have deliberately and firmly reſolved upon, viz. rather to bereave the earl of his life, than to part with his gun, upon a falſe and groundleſs apprehenſion, that the earl meant to uſe violence in depriving him of the gun; and therefore, as, from the facts as ſtated by the pannel himſelf, it cannot be qualified, that either at the time he gave the earl the mortal wound, or at any time before, he was *in periculo vitæ conſtitutus*, that part of the pannel's defence, in ſo far as it is founded upon ſelf-defence, will likewiſe fall to be repelled.

It was, in the next place, pleaded for the pannel, that although, in this caſe, he had exceeded the *moderamen inculpatæ tutelæ*, either in defending his life or property, that yet he could not on that account be ſubjected to the *pœna ordinaria*, but that he would only fall to be puniſhed, *quoad exceſſum*, with an arbitrary puniſhment.

But, with all ſubmiſſion, there are not, in the preſent caſe, *termini habiles* for this queſtion. For, in order to intitle any man to plead ſelf-defence to any effect whatever, he muſt be able to qualify, that he was *in periculo vitæ conſtitutus*. If a perſon was truly in imminent hazard of his life, and the queſtion was, whether he could have extricated himſelf out of that danger, without taking away the life of his adverſary, the pannel might, in ſuch caſe, plead with ſome degree of reaſon, that when his life was truly in imminent danger, and when he had killed, in order to relieve himſelf out of that danger, he ought not to be puniſhed with the pains of death, becauſe it was poſſible he might have extricated himſelf, without going to the extremity of killing the perſon who threatened his death; but, as it has been already ſhown, that the pannel was at no time in the ſmalleſt hazard of his life, or had the leaſt reaſon to apprehend, that any degree of violence would be committed againſt his perſon; and as, on the other hand, the perſon whom he killed had threatened him no harm or violence, and was, at the time, unarmed, and totally defenceleſs, it is impoſſible that there can be any room for enquiring whether, or how far, the pannel had exceeded the *moderamen inculpatæ tutelæ*.—Such exceſs does clearly ſuppoſe that he was acting in defence of his life, which has been already ſhown, could not have been the caſe, as his life, at no time, was in the ſmalleſt danger.

Neither is there any room for the queſtion, whether the pannel, in this caſe, exceeded the *moderamen inculpatæ tutelæ*, in defending his property. Such a plea does neceſſarily imply, that it was lawful for him to defend his property, at the expence of the life of the invader. If the earl could have been conſidered as a robber making an attack upon the pannel, with a felonious intention of robbing him of his

property, there might, in that caſe, have been room for the queſtion, whether the taking away of the earl's life was an act abſolutely neceſſary for the defence of his property, or, if his property could have been ſaved without going to that extremity; and, under theſe circumſtances, there might have been room for the pannel's maintaining, that he ought not to be puniſhed with the pains of death, becauſe he had gone farther than was ſtrictly neceſſary for preſerving his property. But it has been already ſhown, that the pannel, in this caſe, was at no rate intitled to maintain poſſeſſion of his property at the expence of the earl's life; and, if ſo, there can be no room for conſidering whether he has been guilty of an exceſs or not. It is plain, that he has felonioufly ſhed the blood of an innocent man, without any juſt cauſe, and muſt therefore be ſubjected to that puniſhment which the law has inflicted upon the commiſſion of ſo barbarous and unnatural a crime.

It was pleaded for the panel, in the *laſt place*, that the law made a diſtinction betwixt homicide committed upon premeditated malice, and that which was committed upon ſuddenty or *chaude melle*; that the latter could only be deemed a *homicidium culpoſum*, and not puniſhable by death; and that as it could not be ſaid, that there was any premeditated malice in this caſe, but as the earl was killed upon a ſudden quarrel, in conſequence of provocation given, that therefore the libel fell to be reſtricted to an arbitrary puniſhment; and it was ſaid, that the foreſaid diſtinction took place in the divine law delivered by Moſes to the Iſraelites;—in the civil law;—in the law of England;—and alſo in the law of Scotland; and was accordingly likewiſe founded in the practice of this court.

Before conſidering the particular laws here appealed to, the purſuers muſt beg leave, in general, to premiſe, that it will be of no moment to the pannel how this point ſtands by the laws of other countries, if the diſtinction does not hold in the law of Scotland. The queſtions which have hitherto been treated, viz. How far it is lawful to kill in defence of life or goods, depend on principles which are founded in human nature, and which being the ſame all the world over, the law with regard to them muſt in a great meaſure be the ſame in every civilized ſtate; and therefore, in illuſtrating the municipal laws of this country in theſe particulars, the laws of other wiſe and civilized ſtates may with great propriety be appealed to; but as to the other queſtion, viz. What degree of puniſhment ought to be inflicted upon the commiſſion of this or the other crime, there is no arguing with the ſame propriety from the law of one country to

that of another. The intention of puniſhment is to curb vice, that mankind in ſociety may live in peace and quiet, and be ſecured both in their lives and properties. Different nations are, ſome more, and ſome leſs, addicted to different vices; and therefore, in enacting puniſhments, the different tempers and diſpoſitions of the people fall to be conſidered.

Thus, among the Romans, theft was not puniſhed capitally. It was there thought to be a ſufficient check to the commiſſion of that crime to puniſh the thief with the *reſtitutio quadrupli, in furto manifeſto, et dupli, in furto nec manifeſto*; and ſuch was likeways the puniſhment of theft by the Jewiſh law: But among modern nations this puniſhment has been underſtood as inadequate to the commiſſion of that crime; and ſo in many caſes it is puniſhed capitally. And therefore, although other nations might not find it neceſſary to puniſh homicide, without forethought felony, with the pains of death, yet the *præfervidum Scotorum ingenium* might render it very neceſſary and expedient that homicide, committed on ſuddenty, and *in rixa*, ſhould be puniſhed capitally with us.

The purſuers at the ſame time apprehend, that the diſtinction here attempted to be eſtabliſhed for the pannel, did not take place either in the divine law, or in that of the Romans, and does not obtain either in the law of England, or, it is believed, in the law of any well-governed ſtate. It was formerly obſerved, that the chief intention of puniſhment is to curb the depraved paſſions of mankind; and although the perſon who calmly and deliberately meditates the death of his neighbour, and puts the ſame in execution, is guilty of a more heinous offence in the ſight of God, than he who in the heat of anger kills him ſuddenly; yet the latter appears to be more dangerous to ſociety than the former. The moſt wicked man muſt ſtartle at the thought of a deliberate murder, and therefore it will be but ſeldom or rarely committed; and as the other happens much more frequently, it becomes neceſſary and expedient to inflict the higheſt puniſhment upon the commiſſion of it, that mankind may thereby be deterred from falling into the crime, and may be led to keep a ſtrict guard over themſelves, and curb and confine their paſſions within proper bounds.

In order to ſhow that the above diſtinction did obtain in the divine law, the counſel for the pannel did appeal to chap. 21. ver. 13. of Exodus, where it is ſaid, "And if a man lie not in wait, but God deliver him into his hand, then I will appoint thee a place whither he ſhall flee."—And to chap. 35 of Numbers, ver. 22, 23, and 24, where it is ſaid, "If he thruſt him ſuddenly, without enmity, or have caſt upon

him any thing, without laying of wait, or with any ſtone wherewith a man may die, ſeeing him not, and caſt it upon him, that he die, and was not his enemy, neither ſought his harm, then the congregation ſhall judge between the ſlayer and the revenger of blood, according to theſe judgments."

But, with all ſubmiſſion, the texts here appealed to do by no means prove what is intended to be eſtabliſhed by them. It is clear from the texts themſelves, that the manſlayer was only intitled to the benefit of the city of refuge, where the ſlaughter was purely caſual, or by misfortune, without any intention to kill. This is plainly the meaning of the words in *Exodus*, "If a man lie not in wait, but God deliver him into his hands." Theſe words can with no propriety be applied to the caſe of homicide intentionally and wilfully committed, although the intention *non antecedit congreſſum.*

Indeed this matter is clearly explained in the foreſaid 35th chapter of Numbers, ver. 16, 17, and 18, compared with ver. 21. In the three firſt verſes it is ſaid, that he who ſmites with an inſtrument of iron, or who ſmites with throwing a ſtone, or with a hand-weapon of wood, wherewith a perſon may die, and he die, he is a murderer, and the murderer ſhall ſurely be put to death. But in ver. 21, it is ſaid, that "If in emnity he ſmite him with his hand, that he die, he that ſmote him ſhall ſurely be put to death; for he is a murderer."

Your lordſhips will here obſerve, that, where the ſtroke is given with a weapon not deadly, and from which there was no reaſon to apprehend that death would enſue, previous enmity muſt appear, in order to puniſh the killer as a murderer; but where the ſtroke is given with a deadly weapon, and death did enſue, there was no neceſſity to prove any previous enmity. The ſtriking with a lethal weapon did not preſume an intention to kill; and the perſon killing, under theſe circumſtances, was to be held as a murderer; and there was no neceſſity to prove that the ſame proceeded from premeditated malice. An intention to kill is to be preſumed; and it was ſufficient that the intention *antecedit ictum, licet non congreſſum.*

It is from thence plain, that ſlaughter, upon ſuddenty, even without forethought or previous enmity, was capital by the law of Moſes, if the wound was given with a lethal weapon; and that the caſes mentioned in the foreſaid texts do plainly allude to homicide, merely caſual; and which is clearly ſo expreſſed in the foreſaid texts of Exodus, and alſo in the other text in Numbers, where the caſe is ſtated of killing by throwing a ſtone, ſeeing him not, which can never apply to the caſe of intentional homicide.

And that the benefit of thoſe cities of refuge was only given

to thoſe who committed homicide merely caſual, or by misfortune, without any intention to kill, is ſtill more clear from Deuteronomy, cap. 19. ver. 4 and 5. "And this is the caſe of the ſlayer which ſhall flee thither, that he may live; whoſo killeth his neighbour ignorantly, whom he hated not in time paſt; as when a man goeth into the wood with his neighbour to hew wood; and his hand fetcheth a ſtroke with the ax to cut down the tree, and the head ſlippeth from the helve, and lighteth upon his neighbour that he die, he ſhall flee into one of theſe cities, and live."

The example here given, for illuſtrating the text, proves, in the cleareſt manner, that thoſe only who committed homicide purely caſual, were entitled to the benefit of the cities of refuge.

Nor is it of any moment, what was obſerved on the other ſide, that it was abſurd to ſuppoſe that an innocent perſon ſhould be obliged to fly into a city of refuge. The reaſon thereof is explained in the ſubſequent verſe; "Leſt the avenger of the blood purſue the ſlayer while his heart is hot, and overtake him." The Jews were prone to revenge, and, therefore, the ſanctity of theſe cities of refuge was conſidered as neceſſary for protecting the perſon who had ſhed blood from the reſentment of the friends of the perſon killed.

The pannel, in the next place, endeavoured to ſhow, that, in the civil law, a diſtinction was eſtabliſhed betwixt homicide flowing from premeditated malice, and that committed on ſuddenty, and that the latter was not puniſhed capitally; but the purſuers, after making all the ſearches they can into that law, cannot diſcover that there is the leaſt foundation for the diſtinction; on the contrary, whoever committed homicide *dolo malo*, whether deliberately, and upon forethought, or of ſuddenty, was to be puniſhed *lege Cornelia de ſicariis.*—*Dolus malus* is, by the law of every country undoubtedly eſſential to conſtitute the crime of murder; but it was ſufficient, by the Roman law, as well as by the laws of every other country known to the purſuers, that the intention to kill, *antecedit ictum, licet non congreſſum.*

Intention, or the act of the mind, can only be known from external circumſtances; and ſo the general rule laid down in the civil law was, that if the perſon killing ſtruck with a mortal weapon, and death followed, he was juſtly held as a murderer. "Si gladium ſtrinxerit, et in eo percuſſerit, indubitate occidendi animo id eum admiſiſſe, *l.* 1. § 3. *ff. ad legem Corneliam de ſicariis.*" Here the law does not require, that premeditated malice ſhould be proved; but where death happens, by a wound given with a lethal weapon, the law has laid it down, that it is to be preſumed that it was done with a felo-

a felonious intention; and, as therefore, it muſt be conſtructed as voluntary ſlaughter, done *dedita opera*, the actor ought to be puniſhed capitally; and it was ſufficient that the ſtroke was given with a murderous intention, although that intention did not take its riſe from premeditated malice.

This doctrine is accordingly clearly laid down by *Voet. ad leg. Corn. de ſicariis*, § 9. *circa med.* After ſetting forth, that the huſband who killed his wife found in the act of adultery, was not to be puniſhed capitally, he proceeds in theſe words: "Cumque hoc ita in marito, per graviſſimam adulterii injuriam concitato, *jure ſingulari* conſtitutum ſit, aut ſubito atque ſpontaneo iræ impetu concitatos, aut injuria leviore ad iram commotos, atque ita adverſarium occidentes, porrigendum non eſt; ſed potius ad ordinariam hi legis Corneliæ pœnam revocandi forent. Licet enim diſtincta hæc ſint, impetu et propoſito delinquere, non tamen ideo illi qui impetu delinquunt, extra dolum ſunt; quod uti probatum antea de iis qui per ebrietatem peccarunt. Ita etiam in illis, qui iracundiæ calore ſtimulati, cædem perpetrarunt, verum eſt, dum et in ira, neque judicium, neque aſſenſus animi, neque voluptas, deeſt."

Your lordſhips will likeways obſerve, from a paſſage formerly recited from the ſame learned author, that no provocation by words is ſufficient to excuſe *a pœna ordinaria*; and it is extremely plain that homicide committed upon ſuch provocation is underſtood to proceed from a ſudden heat of paſſion, and not from premeditated malice.

The *l.* 1. § 3. *ff. ad leg. Corn. de ſicariis*, was appealed to on behalf of the pannel. It is in the following words: "Divus Hadrianus reſcripſit, eum qui hominem occidit ſi non occidendi animo hoc admiſit abſolvi poſſe; et qui hominem non occidit, ſed vulneravit aut occidat pro homicida damnandum et ex reconſtituendum hoc, nam ſi gladium ſtrinxerit, et in eo percuſſerit, indubitate occidendi animo id eum admiſiſſe. Sed ſi clavi percuſſet, aut cucuma in rixa quamvis ferro percuſſerit, tamen non occidendi animo, leniendam pœnam ejus, qui in rixa caſu magis quam voluntate homicidium admiſit." And they further appealed to *l.* 1. *cod. dict. tit.* which is in the following words: "Frater veſter rectius fecerit, ſi ſe præſidi provinciæ obtulerit, qui ſi probaverit non occidendi animo hominem a ſe percuſſum eſſe, remiſſa homicidii pœna, ſecundum diſciplinam militarem ſententiam proferet. Crimen enim contrahitur, ſi et voluntas noſcendi intercedat, cæterum ea quæ ex improviſo caſu potius quam fraude accidunt, fato plerumque non noxe imputantur."

But it is, with ſubmiſſion, inconceivable how the pannel can expect to receive any aid from theſe authorities: on the contrary,

trary, when they are duly conſidered, they eſtabliſh the very doctrine which the purſuers are endeavouring to maintain. Your lordſhips will obſerve, that the ideas of the Jewiſh law, above ſtated, are here adopted. Where the perſon killing, ſtruck with a weapon from which he had no reaſon to apprehend that death would follow, and where no previous enmity betwixt the parties did appear, or could be alledged, ſo that, upon the whole, no intention to kill could be preſumed, the law hath ſaid, that in ſuch caſes the puniſhment ought to be mitigated; but then the very ſame law hath ſaid, that where the perſon ſtruck with a lethal weapon, malice and intention to kill muſt unqueſtionably be preſumed, "ſi gladio percuſſerit, indubitate occidendi animo id eum admiſiſſe." And as in this caſe the pannel killed the earl by pouring a loaded muſket into his bowels, it is impoſſible to doubt, and the law does preſume, that it was done with the felonious intention of bereaving the earl of his life; and, of conſequence, nothing leſs than a capital puniſhment can, with any ſhew of reaſon or juſtice, be inflicted upon him.

The purſuers ſhall not trouble your lordſhips with running over any of the other authorities that were ſtated for the pannel upon this point. What has been ſaid affords a ſufficient anſwer to all and each of them. They only reſpect the caſe where homicide is committed in a fray; and where, from the weapons that were uſed, and the circumſtances of the caſe, it does not appear that the party had an intention to kill; the very contrary of which was clearly the caſe of this pannel.

With reſpect to the law of England, after what has been already ſaid upon another branch of the defence, it will be unneceſſary to trouble your lordſhips with much more upon it. The purſuers apprehend, that the law of England is clearly againſt the pannel upon this point; and that, were he to be tried in England, and the indictment proved againſt him, he would be found guilty of murder, and puniſhed with the pains of death.

The law of England has ſo far interpoſed in favour of human frailty, that where a perſon, in a ſudden tranſport of paſſion, upon juſt provocation received, kills his neighbour, the ſame is differenced from murder, and is only to be puniſhed as man-ſlaughter. But your lordſhips will obſerve, that taking the facts even as ſtated by the pannel, he cannot poſſibly bring himſelf under that predicament. It from thence appears, that it was not in the heat of paſſion, and in reſentment of provocation given, that the earl was killed; but, on the contrary, it does appear, that the pannel was perfectly maſter of himſelf upon the occaſion; that he accordingly, for

ſome

ſome time, retired from the earl with the muſquet preſented, and ready to be diſcharged; and that it was upon the earl's approaching near to him, that the pannel killed him, in proſecution of a determined purpoſe and reſolution, upon no account to quit his gun. It is a queſtion toſt by the writers upon the law of England, what time may be preſumed ſufficient for a man to cool, ſo as to render the crime wilful and intentional murder; but there is no room for that queſtion here, as it is clear from the pannel's own ſhowing, that he was never heated; that he was all along perfectly maſter of himſelf, and that the act he committed was not the reſult of his being overcome by a ſudden guſt of paſſion; but that it was truly the reſult of a fixed, determined, and deliberate purpoſe. Every caſe muſt be determined upon its own circumſtances; and it is humbly ſubmitted, if the circumſtances above noticed, all ariſing from the pannel's own ſtate of the facts, are not ſufficient to bring the crime according to the ideas of the law of England, under the denomination of wilful murder.

But, 2°. your lordſhips will obſerve, that, independent of theſe conſiderations, an eſſential ingredient is here wanting, in order to render the crime manſlaughter. The only provocation the pannel is alledged to have received, was merely verbal; the earl was all the time unarmed, and never touched the pannel's perſon.

This circumſtance alone is, by the law of England, ſufficient to render this crime murder, and not manſlaughter. If the earl had made an actual aſſault upon the pannel's perſon, and if a tuilzie had thereupon enſued, and the earl had been killed, there might have been a pretence for pleading, that the pannel, by the law of England, would only have been guilty of manſlaughter. But it appears from the authority of Mr. Juſtice Foſter, Blackſtone, and Hawkins, ſtated in a former part of this information, that no verbal injury, how grievous ſoever, is ſufficient to free the party killing from the guilt of murder, if the death was occaſioned by a lethal weapon. If the perſon provoked by a verbal injury ſhould, in return thereof, have ſtruck with a weapon not likely to kill, an intention to kill could not neceſſarily from thence be inferred; and the killing in ſuch caſe might be ruled manſlaughter only. The law of England, in this particular, ſeems to be founded upon the very ſame ideas with that of the Jews and of the Romans, already mentioned. But, where the wound is given with a lethal weapon, as in this caſe with a gun, which muſt neceſſarily preſume an intention to kill, the caſe, by the law of England, would be ruled murder, becauſe no verbal provocation whatever is ſufficient to free the party from the guilt of murder; and ſo where,

upon a verbal provocation, homicide happens, and where the killing appears clearly to have been intentional, the law in ſuch caſes rules it to be murder.

Sundry caſes might be ſtated from the law of England, for illuſtrating the difference betwixt murder and manſlaughter; but it will be unneceſſary to trouble your lordſhips with any of theſe in the preſent caſe. The general principles above laid down are uncontroverted, and are clearly ſufficient for determining the preſent queſtion.

It was, in the laſt place, maintained upon the part of the pannel, that the diſtinction already ſtated betwixt murder committed upon forethought, and homicide committed upon ſuddenty, took place in the law of Scotland; that the former only was capital, but that the latter, as being only *homicidium culpoſum*, was to be puniſhed arbitrarily; and that, as this diſtinction took place in the old law of Scotland, ſo it was not taken away by the ſtatute 1661.

But the purſuers humbly apprehend, that this diſtinction is not founded in the law of Scotland; that, at no period, wilful homicide, though committed without forethought, felony, and premeditation, was puniſhed arbitrarily; and that if ever the law ſtood otherwiſe, it was clearly ſo far altered by the ſtatute 1661.

With reſpect to the firſt point, it appears from ſundry of our old ſtatutes, that wilful and intentional homicide was at all times puniſhed with death, without diſtinction. By *chap.* 3. *1ſt ſtatute of Robert* I. intituled, "Men condemned to the death ſhould not be redeemed," it is ſtatute and ordained, "Gif any man, in any time coming or bygane, what condition or eſtate he be, is convict or attainted of ſlaughter, reif, or of any other crime touching life and limb, common juſtice ſhall be done upon him, without any ranſom, ſaving the king's power, and alſo the liberties, ſpecially given and granted by the king that now is, and his predeceſſors, to the kirk and kirkmen, and other lords."

Here ſlaughter in general is mentioned, and juſtice was to be done upon the perſon convicted or attainted of it; and the puniſhment by the title was plainly death, ſo that by the law of Scotland, ſlaughter in general was capital, without diſtinction.

By *chap.* 43. *of the ſtatute of king Robert* III. it is ſtatute, "That nae man uſe any deſtruction, hairſhips, burning, reif, *ſlaughter* in time to come, under the pain of tinſel of life and goods moveable."

Here the pain of death is likewiſe declared to be the puniſhment of ſlaughter in general, without diſtinction. And in the immediate ſubſequent chapter, the ſheriff was to take diligent

diligent inquiſition of deſtroyers of the country, or ſuch as had deſtroyed the king's lieges with heirchippis, ſlaughter, &c. and was to take bail from them, if arreſted, to compear at the nixt juſtice Aire; and, if bail was not given, the ſheriff was to put him to the knowledge of an aſſize; and gif he be taint with the aſſize for ſick an treſpaſſon, he ſhall be condemned to death. This can only relate to man-ſlaughter, and not to murder, upon forethought felony, which was one of the pleas of the crown to be tried only before the king's juſticiar, whereas ſlaughter might be tried by the ſheriff, where there was a certain accuſer, as appears from *book* 1. of the *Majeſty*, *cap.* 1. § 8.

In like manner, the cap. 2d. of the ſtatutes of Alexander II. does plainly preſuppoſe, that ſlaughter, without diſtinction, was capital; and, accordingly, Skene, in his Treatiſe of Crimes, tit. 2. cap. 6. a book of the higheſt authority, lays it down, "That manſlaughter, committed voluntarily, be forethought felony, or caſually by *chaude melle*, generally is puniſhed by death, and confiſcation of the moveable goods pertaining to the treſpaſſer; ſo that the girth or ſanctuary is nae refuge to him who commits ſlaughter be forethought felony; but he ſhould be delivered to the judge-ordinary, to underlie the law."

Here it is plainly laid down, that manſlaughter, whether committed by forethought felony, or on ſuddenty, is puniſhed with the pains of death; with this difference, that the girth or ſanctuary was no refuge to him who commits ſlaughter by forethought felony, but he was to be delivered to the judge-ordinary to underlie the law; which is expreſly enjoined by act 23, parliament 4 James V. whereby maſters of the girth are ordained to deliver up to juſtice, to underlie the law for their crime, ſuch perſons as are guilty of murder, upon forethought felony.

It was upon this ſtatute, and others to the ſame purpoſe, that the counſel for the pannel endeavoured to eſtabliſh a diſtinction betwixt manſlaughter upon forethought felony, and ſuch as was committed on ſuddenty. They contended, That, as the maſters of the girth were directed and ordained to deliver up to juſtice ſuch only as were guilty of murder upon forethought felony, that therefore homicide, committed on ſuddenty, was not capital.

But the purſuers do humbly beg leave to maintain, that the concluſion does by no means follow from the premiſſes; for although murder, in every degree, does juſtly merit the pains of death, yet murder, as well as other crimes, does admit of different degrees of aggravation; and indeed there can be no doubt, that the man who cooly and deliberately

meditates the death of his neighbour, and executes his purpoſe accordingly, is more criminal in the ſight of God, than the perſon who, in a ſudden ſtart of paſſion, puts his neighbour to death; and, therefore, all that is proved by thoſe ſtatutes is no more than this, that thoſe who were guilty of murder, ſo aggravated, were not entitled to the benefit of the ſanctuary, but the maſters and keepers thereof were bound to deliver them up to juſtice; whereas thoſe who were only guilty of murder upon ſuddenty were entitled to the benefit of the ſanctuary, and could not be delivered up.

And it will by no means from thence follow, that, becauſe the girth or ſanctuary was a protection to them from puniſhment, that therefore, if they did not reſort to the ſanctuary, they were not puniſhable; or that the pains of death were not to be inflicted, in caſe they were apprehended and convicted, before retiring to the ſanctuary. The counſel for the panel adduced no authority to prove this; and yet, unleſs they prove this, they plainly prove nothing. There is no inconſiſtency in ſuppoſing that a crime ſhould be capital, and at the ſame time there ſhould be a ſanctuary which afforded the guilty perſon a protection againſt puniſhment; and, indeed, it clearly appears from cap. 6. of the ſtatutes of Alexander II. That criminals who reſorted to, and took ſanctuary in, churches, had protection, though their crimes were capital. It is there ſtatute, "Anent thieves and rieſers, who flys to haly kirk, that, gif any of them, moved with repentance, confeſſes there that he has heavily ſinned, and, for the love of God, is come to the houſe of God for ſafety of himſelf, he ſhall have peace in this manner, that is, that he *ſhall not tyne life nor limb*, but what he hath taken frae any man he ſhall reſtore ſae meikle to him, and ſhall ſatisfy the king, according to the law of the country, and ſua ſhall ſwear, upon the holy evangil, that thereafter he ſall never commit reif nor theft." And, in the laſt paragraph of that chapter, it is ſaid, "Mairover, *man-ſlayers*, traitors to their maſters, and they who are challenged of murder or treaſon, ſall be lawfully accuſed thereanent, and gif they, in manner foreſaid, fly to the kirk, the law aforeſaid ſall be kept and obſerved to them."

It is from this ſtatute plain, that the girth or ſanctuary was a protection to criminals who had committed the moſt atrocious crimes, and ſuch which were clearly puniſhed capitally. There can be no doubt, that thoſe guilty of murder or treaſon were, at the period of the foreſaid ſtatute, liable to be puniſhed capitally, if they did not fly to holy kirks; and therefore, although by ſubſequent ſtatutes, thoſe guilty of aggravated murder, *viz.* ſuch as was committed upon forethought

thought felony, were deprived of the benefit of the ſanctuary, yet all other crimes remained upon their former footing. What were capital before, remained capital ſtill, and ſuch as were guilty thereof, if they did not fly to the ſanctuary, could be capitally puniſhed. And accordingly Sir George Mackenzie, in his obſervations upon act 90, parl. 6 James I. expreſly lays it down, "That murder, though committed without forethought felony, is puniſhable by death, except it was either caſual or in ſelf-defence, and then it is called properly homicide, or manſlaughter."

But it is unneceſſary to make any further enquiry how the law of Scotland ſtood in this particular in ancient times, becauſe, with ſubmiſſion, it cannot admit of a doubt, that ſince the 1661, the committers of wilful homicide are liable to a capital puniſhment, without diſtinction, whether it was committed upon forethought or upon ſuddenty.

The act 22 parl. 1661, "For removing of all queſtion and doubt that may ariſe hereafter in criminal purſuits for ſlaughter, ſtatutes and ordains, that the caſes of homicide after following, *viz.* caſual homicide, homicide on lawful defence, and homicide committed upon thieves and robbers, breaking houſes in the night, or in caſe of homicide, the time of maſterful depredation, or in the purſuit of denounced or declared rebels for capital crimes, or of ſuch who aſſiſt and defend the rebels, and maſterful depredators by arms; and by force oppoſe the purſuit and apprehending of them, which ſhall happen to fall out in time coming, nor any of them ſhall not be puniſhed by death; and that notwithſtanding of any laws and acts of parliaments, or any practique made heretofore, or obſerved in puniſhing of ſlaughter. But that the man-ſlayer, in any of the caſes aforeſaid, be aſſoilzied from any criminal purſuit purſued againſt him, for his life for the ſaid ſlaughter, before any judge criminal within this kingdom; providing always, that in the caſe of homicide caſual, and of homicide in defence, notwithſtanding that the ſlayer is by this act free from capital puniſhment, yet it ſhall be leiſome to the criminal judge, with advice of the council, to fine him in his means, to the uſe of the defunct's wife and bairns, or neareſt of kin, or to impriſon him."

One of the pannel's learned counſel was pleaſed to obſerve, that the word *caſual*, which occurs in this ſtatute was not an Engliſh word, that it was to be found in no Engliſh dictionary, and by giving it a Latin derivation, he endeavoured to ſhow, that it was broad enough to comprehend the caſe of *wilful* homicide, committed without forethought felony.

The

The purſuers ſhall not trouble your lordſhips with following the pannel's learned counſel in his many ingenious criticiſms. It is ſufficient to ſay, that the word *caſual* is well known in the language of the law of Scotland, and muſt have been underſtood by the legiſlature when uſed in the aforeſaid ſtatute; and that it is equally well known in the language of our neighbouring country, appears from moſt of the Engliſh dictionaries, and particularly Johnſon's; and, therefore, the criticiſms built upon this capital miſtake muſt all fall to the ground. The purſuers ſhall not enter into a critical examination of the derivation of the word *caſual*. It is a word perfectly well underſtood; and caſual homicide, in their apprehenſion, carries along with it a very different meaning from homicide wilfully and felonioufly committed, though not proceeding from malice long premeditated.

It was further obſerved upon this act, with regard to caſual murder, that having been firſt paſſed during the uſurpation, in the parliament 1649, and another act having been made the ſame day, declaring that there ſhould be no remiſſions in capital crimes, it could not be ſuppoſed that murder upon ſuddenty, without premeditated malice, was underſtood to be a capital crime, and unpardonable; from which it was inferred, that when the ſame ſtatute was re-enacted in the year 1661, it could not be intended that this crime ſhould be capital. But this argument is extremely inconcluſive; for although it was thought proper during the uſurpation, to paſs an act declaring capital crimes unpardonable, yet it was not thereby intended to alter the general nature of crimes, or to make thoſe not capital which formerly were ſo.—The act extends to all capital crimes whatever, many of which were attended with a much leſs degree of guilt than wilful murder, tho' committed upon ſuddenty; for example, theft, robbery, hameſucken, *&c.* So that the argument goes a great way too far, in ſuppoſing that no crime leſs than murder, upon forethought felony, was underſtood to be capital and unpardonable: and beſides, as the act here founded on was not renewed after the Reſtoration, it is now out of the queſtion.

It was further ſaid for the pannel, that though, in the caſes mentioned in the ſtatute, the law ordained homicide not to be capital, yet it is neither ſaid, nor ſuppoſed that the former law, whereby pannels were intitled to plead againſt a capital puniſhment, was thereby abrogated; and that ſundry caſes might be ſtated which did not fall directly under the exceptions mentioned in the ſtatute, and where yet it could not be diſputed that a capital puniſhment would not fall to be inflicted.

The

The purſuers have no occaſion in this caſe to plead, that perſons guilty of wilful homicide committed without forethought felony, were by this ſtatute deprived of a defence which was competent to them before the ſtatute was made; they do apprehend that ſuch homicide was puniſhed capitally before the ſtatute, as well as after it. At the ſame time, if the law had ſtood otherways, it canot well be doubted, that upon a ſound conſtruction of the ſtatute, ſuch homicide would thereafter have fallen to be puniſhed capitally; for when the declared intention of the ſtatute was to remove all *doubts* and queſtions that might thereafter ariſe concerning purſuits for *ſlaughter*; and when in removing theſe doubts, it makes particular mention of homicide in lawful defence, and homicide committed upon thieves and robbers, or in the time of maſterful depredations, *&c.* as not liable to a capital puniſhment, it is, with ſubmiſſion, impoſſible to ſuppoſe, that if the legiſlature had meant and intended that wilful and intentional homicide committed on ſuddenty was not to be puniſhed capitally, it would not have been particularly mentioned. It can never be imagined, that when the legiſlature, for the purpoſe of removing all doubts and queſtions, was anxiouſly enumerating a variety of caſes where death was not to be inflicted, that they would have omitted a caſe which the pannel himſelf muſt admit was a hundred times more doubtful than any of theſe particularly mentioned. It would be, with ſubmiſſion, abſurd to ſuppoſe, that the legiſlature would have enacted in the caſes that were more clear, and have left the moſt difficult of them in the dark; as ſurely the greateſt advocates for ſlaughter on ſuddenty, muſt admit, that it is much more culpable than any of the other ſpecies of homicide mentioned in the ſtatute.

The purſuers ſhall not maintain, that the ſtatute is to receive ſo *judaical* a conſtruction, as that every other homicide which does not fall directly within the ſtrict letter of the ſtatute, was to be puniſhed capitally. Other caſes might, no doubt, be figured, which, though they do not fall within the words, do fall within the ſpirit of the ſtatute. The legiſlature has therein made an enumeration of ſundry particulars, which are ſufficient to explain the nature of the caſes which do not fall to be capitally puniſhed; and, as wilful and intentional homicide, though committed on ſuddenty, is, in its nature, totally different from all and each of the caſes mentioned in the ſtatute, the purſuers may fairly conclude, that upon no juſt conſtruction of the ſtatute, this caſe can be brought under either the words or ſpirit of it.

The

The purſuers ſhall now proceed to ſtate a few caſes, in order to ſhow your lordſhips, that the law of Scotland has been underſtood to be agreeable to what has been maintained on their part, and that before and after the ſtatute of 1661.

In the caſe of Bruce *contra* Marſhall, the 3d of April 1644, ſlaughter was libelled, and he was condemned upon his own judicial confeſſion, from which it appears that he was ſo far from having any forethought, that he ſuffered not only the greateſt provocation in words, but was even beat with hands and feet by the defunct, while he was on the ground; but, at laſt, getting up, and (as the confeſſion bears) being overcome with paſſion, he drew a knife, and ſtruck at him in two ſeveral places of his body, whereby he died; and upon this confeſſion, where there was a ſuddenty, provocation, and paſſion, he was brought in as guilty, and condemned to be beheaded.

In the caſe of Murray *contra* Gray, 10th June 1678, the lords found the libel relevant, and that there was no neceſſity of any diſtinct probation for proving *precogitated malice*, which clearly ſhews, that homicide, though not upon forethought, was capital.

In the caſe of Aird, who was indicted in the year 1693, for the murder of Agnes Bain, having given her ſome ſtrokes on the ſide and belly with his foot, by which ſhe fell into fainting-fits, and immediately died. The defence was great provocation and caſual homicide.—Provocation, in as far as ſhe threw a chamber-pot in his face, and when he gave her hard words, ſhe and her neighbour fell upon him and beat him, upon which he gave her the ſtrokes above-mentioned; and in that trial it was argued, that there was no *animus occidendi*; no previous malice nor mortal weapon; and the arguments urged in defence of the preſent pannel, were pleaded for the pannel in that caſe: nevertheleſs, the lords found the libel revelant, repelled the defences, and, upon the proof, he was ſentenced to die.

In the year 1695, George Cumming, writer in Edinburgh, was indicted for the crime of murder or manſlaughter of Patrick Falconer. The defence now offered for the pannel, upon the diſtinction between forethought and *chaude melle*, was there pleaded; nevertheleſs the libel was found relevant, and the jury returned a verdict *guilty of man-ſlaughter*. Upon which he was condemned *to die*.

In the caſe of Hamilton of Green, 30th June 1716. The pannel offered to prove, that he was accidentally at the houſe of Thomas Arkle, of whoſe murder he was accuſed, upon

the day libelled, with ſome of his acquaintances, and had no deadly weapon along with him: that he became intoxicated to a great degree, and having left the houſe, and returned to aſk for the ſlip or cover of the ſheath of a ſword, the defunct gave him moſt indecent, injurious, and ſcurrilous language; and, perſiſting in it, the pannel puſhed, or ſtruck at him with his ſword, having the ſcabbard thereon, which he had reaſon to believe had a crampet upon it; and, being ſtill more and more provoked, by repeated injurious words, to protect himſelf from farther inſolence, which he had reaſon to look for, the pannel ſtill remaining on horſeback, the defunct ruſhed himſelf upon the ſword: and this circumſtantiate fact was offered to be proved; nevertheleſs, the libel was found relevant, and the pannel's whole defences repelled; and, upon the proof, he was ſentenced to have his head ſevered from his body, and was accordingly beheaded.

In the caſe of Thomas Roſs and Jeffrey Roberts, 20th July 1716, it was urged for the pannels, That, being recruits, lately come from England to Scotland, and not knowing the way, they aſked the defunct the road to Edinburgh, who refuſing to ſhow it, and one of the pannels expoſtulating with him, why he treated a ſtranger ſo, that came to ſerve the king? he uttered very diſreſpectful words, with reſpect to his majeſty; and one of the pannels having called him villain, for ſuch opprobrious expreſſions, he came up to Roſs, and, with his fiſt, gave him a blow on the face, and then pulled him down to the ground, and beat him with a great ſtick, to the *imminent danger of his life*, ſaying, that he ſhould never go alive out of his hands; and Roberts having come to his aſſiſtance, and reſcued him a little, Roſs, the pannel, gave the defunct a wound with a knife, whereof he died. Roſs pleaded, There neither was, nor could be, forethought felony or premeditated malice againſt a perſon whom he had never ſeen before: that it was committed upon ſuddenty: that he had the higheſt provocation, both verbal and real; nevertheleſs, by the interlocutor, Roſs, the pannel, his giving the wound, was found relevant to infer the pain of death. And the defence from provocation by words, and receiving a blow on the face, being pulled down to the ground, and beat, *with a great ſtick, to the danger of his life*, jointly ſuſtained relevant to reſtrict the libel to an arbitrary puniſhment, was found to be elided by the reply; that, at the time of giving the wound to the defunct, the defunct's hands were held by Jeffrey Roberts, the other pannel. From this it is evident, that ſlaughter, upon ſuddenty, and by a perſon who had received the greateſt ver-

bal, and even real injuries, is, by that interlocutor, found to be capital.

Many other caſes might be mentioned; but theſe are ſufficient to ſhow, that *wilful homicide*, by the law of Scotland, has been always underſtood to be puniſhable with the pains of death; and that the pains of death have uniformly been inflicted upon that crime; and that, whether it was committed upon ſuddenty, or upon forethought felony.

Certain caſes were mentioned on behalf of the pannel, in order to eſtabliſh a diſtinction betwixt homicide, committed on ſuddenty, and upon forethought felony; and to prove, that the latter only, and not the firſt, does, by the law of Scotland, admit of a capital puniſhment. But, when theſe caſes are duly conſidered, the purſuers are humbly perſuaded your lordſhips will be of opinion, that they do by no means prove what is intended to be eſtabliſhed by them.

The firſt caſe appealed to, was that of Elizabeth Elphinſton, and his majeſty's advocate, againſt captain William Bruce of Auchinbowie in the year 1709. Captain Bruce was there indicted for the murder of Charles Elphinſton of Airth. They had been together at my lord Forreſter's houſe at Torwoodhead,—where they appeared to be in friendſhip together; but, on their way home, a quarrel aroſe betwixt them, and Mr. Elphinſton was killed. Sundry defences were ſtated for the pannel; and, among others, he pleaded her majeſty's act of indemnity, in bar of the proſecution. To which it was anſwered, That wilful murder was excepted from the Act of Indemnity, and therefore it could not avail the pannel.

To this it was replied, That the exception in the Act of Indemnity did only reſpect murder done upon forethought and premeditated deſign; and that, although the indictment did libel in general terms forethought and premeditation, yet as no circumſtances were condeſcended upon, from whence the ſame could be inferred, it could only be conſidered as ſlaughter committed on ſuddenty, which did not fall under the exception of the Act of Indemnity. And the court, upon adviſing mutual informations, "ſuſtained the defence of her Majeſty's moſt gracious Act of Indemnity, proponed for the ſaid pannel, relevant to elide the ſaid libel, and therefore deſerted the diet thereof againſt him, *ſimpliciter* diſmiſſed him from the bar, and diſcharged him to be farther troubled for the ſaid crime in time coming."

It is ſubmitted, if this caſe is at all to the purpoſe. It does indeed prove that your lordſhip's predeceſſors were of opinion, that the exception in the Act of Indemnity did only com-

comprehend the caſe of murder upon premeditated malice; and that, in the caſe libelled, there was not ſufficient circumſtances condeſcended upon to bring the crime charged under that denomination; but it will by no means from thence follow, that the court was in that caſe of opinion, that, laying aſide the Act of Indemnity, the crime charged could not be puniſhed capitally. It has been already obſerved, that although murder, in every degree, deſerves the pains of death, that yet the crime admits of different degrees of aggravation; and therefore the legiſlature might, with great propriety, pardon murders committed upon a ſudden quarrel, and, at the ſame time, not pardon ſuch as were cooly and deliberately meditated.

The next caſe mentioned on the part of the pannel, was that of William Hunt, dragoon in Sir Richard Temple's regiment, who was indicted for the murder of Henry Macmillan, fleſher in Dalkeith, in the year 1711. It was in that caſe alledged, in defence for the pannel, that a mob had aroſe in the town of Dalkeith, which was headed by the defunct, and attacked ſome of the ſoldiers who were quartered in that town, and proceeded ſo far as to beat them, throw them down in the ſtreet, trample them upon the ground, and otherwiſe maltreat them in a barbarous and cruel manner, to the effuſion of their blood; that the pannel having been at that time upon the guard, he was called out by the ſerjeant who commanded the guard to quell the mob, and relieve the perſons who were ſo attacked and abuſed; and that it was in this tuilzie that the defunct, who headed the rabble, was killed; and from thence it was argued on behalf of the pannel, that as he, at the time libelled, was one of the guard upon duty, and was ordered out under arms, to quell a mob, and relieve his fellow-ſoldiers, who were in no ſmall danger, from the fury and inſolence of the rabble; that what blows he gave on that occaſion were lawfully given. 2*do*, It was alledged, that what was done was in neceſſary defence, either of himſelf, or of the other dragoons who had been thus attacked; and that, ſuppoſing he had been guilty of any exceſs, he could only be ſubjected to an arbitrary puniſhment; and, *ſeparatim*, it was pleaded, that as the defunct was killed *in rixa*, whereof he was himſelf the author, the pannel could not be ſubjected to the pains of death, the more eſpecially, as it appeared that the pannel could have no *animus occidendi*, for that, notwithſtanding he was armed both with a ſword and a muſquet, he did not uſe his muſquet, in the manner that was moſt certain to kill, but only ſtruck with the but-

end of it: and the court, upon adviſing mutual informations, pronounced the following judgment: "Find the ſaid William Hunt, pannel, his going behind Macmillan, the defunct's back, while ſtanding peaceably in the ſtreet, without arms, and knocking him down, by a ſtroke upon his head with the but-end of his muſquet, whereof he died next day, relevant to infer the pains of death, and confiſcation of moveables; and find this defence, *viz.* that there being a tumult in Dalkeith, in which ſome of the dragoons were maltreated, or troden down; and the pannel being upon the guard under duty at the time, was commanded out for quelling the ſaid mob and tumult, and relieving the dragoons; and that the defunct, Macmillan, having been in the rabble and tumult, which attacked that party of the guard commanded out, or any of them, before the ſtroke was given, relevant to aſſoilzie the pannel *ſimpliciter*, and elide the libel; and *ſeparatim* find, that the ſtroke being given *in rixa*, or a tumult, where the defunct was author of the tumult or *rixa* himſelf, or that the ſtroke was given in defence of the pannel, or any of his fellow-ſoldiers, when attacked, relevant to reſtrict the libel to an arbitrary puniſhment."

It is humbly ſubmitted to your lordſhips, with what propriety this judgment is appealed to, in order to eſtabliſh the general propoſition maintained by the pannel, viz. that wilful homicide, if committed on ſuddenty, without premeditated malice, is not puniſhable with the pains of death. If the purſuers rightly underſtand the caſe, it proves the very reverſe; premeditated malice was not ſo much as libelled; nor was a ſingle circumſtance condeſcended on in the indictment, from which forethought felony could be inferred; and yet the libel, as laid, is found relevant to infer the pains of death.

Nor does the latter part of the judgment in the leaſt impugn the doctrine maintained upon the part of the purſuers. The judgment reſtricting the libel to an arbitrary puniſhment, is laid upon this, that the defunct himſelf was the *auctor rixæ*, and there ſeems to be little doubt that the judgment is founded in law. When the defunct himſelf had raiſed a mob, who where beating and abuſing the ſoldiers in a cruel and barbarous manner, to the effuſion of their blood, it would have been a hard caſe if the pannel, acting in defence of himſelf and his fellow-ſoldiers, ſhould ſuffer the pains of death, becauſe he killed the perſon who headed the mob, the more eſpecially, when it does appear from the circumſtances of the caſe, that he had no intention to kill. He only gave a ſtroke with the but-end of his muſquet, which, though it no doubt might

might kill, yet it was the weapon the leaſt lethal of any he was then poſſeſſed of. If he had intended to kill, he infallibly would either have fired with his muſquet, or uſed the ſword which he had at his ſide.

The next caſe mentioned upon the part of the pannel, was that of Peter Maclean, in the 23d January 1710, indicted for the murder of James Ewing. In which caſe the court pronounced the following judgment: "Find the indictment relevant to infer the pains of death, and ſuſtain the defence proponed for the pannel, in theſe terms, viz. that the defunct quarreled the pannel under the name of raſcal, how he durſt carry a fowling-piece, and that, if the prince had his own, he durſt not ſo do; and adding theſe words, that her Majeſty was but a whore, and thereupon aſſaulted the pannel for taking the carabine from him, relevant to reſtrict the libel to an arbitrary puniſhment."

Upon this caſe it is obſervable, that although the indictment does not libel premeditated malice, nor condeſcend upon a ſingle circumſtance from which the ſame could be inferred, (as indeed the pannel was not ſo much as of the defunct's acquaintance) yet the libel was found relevant to infer the pains of death; and therefore the purſuers apprehend, that it is truly a judgment in favour of the doctrine maintained upon their part.

And as to the defence which was there ſuſtained relevant to reſtrict the libel to an arbitrary puniſhment; it is founded upon very peculiar circumſtances, and cannot well be drawn into a precedent for determining other caſes, far leſs for determining a very general and very important point of law.

At the ſame time, very ſtrong reaſons did there concur for the reſtriction: for, beſides the high verbal provocation he received, an aſſault was truly made upon him, in order to rob him of his muſquet.—As he did not know the defunct, he had reaſon to apprehend, that the attack was made with a felonious intention, and conſequently intitled to reſiſt it; and, he was particularly called upon in duty, as a ſoldier, not to part with her Majeſty's arms, with which he was intruſted; and, it appears, that when he fired, it proceeded from real apprehenſions of danger; for he ſhowed an unwillingneſs to kill, having firſt endeavoured to defend himſelf, by clubbing his muſquet.

The next caſe which was mentioned for the pannel, was the noted caſe of Finhaven. But, in what ſhape the pannel can avail himſelf of it, is to the purſuers inconceivable. The circumſtances of that caſe are well known to all your lordſhips, and

and therefore need not be particularly ſtated. The interlocutor of the court, upon adviſing very learned and elaborate informations, is in theſe words: "Find, that the pannel, at the time and place libelled, having, by premeditation, and forethought felony, with a ſword, or other mortal weapon, wounded the deceaſed Charles, earl of Strathmore, of which wound, he, the ſaid earl, ſoon thereafter died, or that he, the pannel, was art and part thereof, relevant to infer the pains of law; but allow the pannel to prove all facts and circumſtances he can, for taking off the aggravating circumſtances of forethought and premeditation: as alſo, find, that he, the ſaid pannel, time and place foreſaid, having with a ſword, or other mortal weapon, wounded the ſaid deceaſed earl, of which wound his lordſhip ſoon died, or that he, the pannel, was art and part thereof, ſeparatim relevant to infer the pains of law, and repel the defences proponed for the pannel."

This, in the purſuer's apprehenſion, is a clear deciſion againſt the pannel, as to the point now in diſpute.—Notwithſtanding that all the arguments which are now urged on behalf of the pannel, were there pleaded with great ingenuity; yet the defences were repelled, and the pannel's killing the deceaſed earl, with a ſword, or other mortal weapon, was, independent of premeditation and forethought felony, found relevant to infer the pains of law, which clearly cuts down the diſtinction now endeavoured to be eſtabliſhed.

The laſt caſe which was mentioned on this point, in behalf of the pannel, was that of lieutenant Robertſon, in the year 1758, indicted for the murder of lieutenant Robert Ewing. But the purſuers are at a loſs to diſcover for what purpoſe that caſe is mentioned. The defence which was pleaded in that caſe was *ſelf-defence*, and which, indeed, was very ſtrongly qualified; and the interlocutor pronounced by the court was in theſe words: "Find the indictment relevant to infer the pains of law, but allow the pannel a proof of all facts and circumſtances that may tend to his exculpation, or alleviation of his guilt."

This interlocutor was very properly adapted to the caſe, without ſuppoſing any diſtinction betwixt ſlaughter on forethought felony, and on ſuddenty. If the pannel proved his defence to its full extent, it was ſufficient to exculpate; and although he ſhould have failed in proving, that lieutenant Ewing's death was abſolutely neceſſary to preſerve his own life, yet if he proved that he was *in periculo vitæ conſtitutus*, this might be relevant to alleviate.

Upon

Upon the whole, the purſuers are humbly perſuaded, that your lordſhips will be of opinion, that there is no relevancy in any of the defences proponed for the pannel, except in ſo far as he alledges that the earl was killed by accident, and not intentionally; and therefore, that your lordſhips, *quoad ultra*, will repel the pannel's defences, find the libel relevant, and remit the pannel, with the indictment, as found relevant, to the knowledge of an aſſize.

In reſpect whereof, &c.

RO. MACQUEEN.